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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-681

DONALD WALLACE, MICHAEL MCLAUGHLIN, *et al.*,

Petitioners,

—v.—

MICHAEL KERN, THE LEGAL AID SOCIETY, THE PEOPLE OF THE CITY AND STATE OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1973

No. .....

DONALD WALLACE, MICHAEL MCLAUGHLIN, *et al.*,

Petitioners,

—v.—

MICHAEL KERN, THE LEGAL AID SOCIETY, THE PEOPLE OF THE CITY AND STATE OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Michael McLaughlin and Donald Wallace, *et al.*, the latter acting on behalf of himself and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 27, 1973.[1]

[1] The instant case is a consolidation of three actions originally brought *pro se* by indigent detainees who have or will have matters pending in the Supreme Court of New York, County of Kings. In *Donald Wallace, et al.*, a class action, 72-C-898, defendants included the Justices of the Supreme Court of the Criminal Term of Kings County, the clerks thereof, the Department of Correction, and the Kings County District Attorney. After the commencement of the *Wallace* proceeding two related actions

Opinions Below

The opinion of the Court of Appeals is reported at 481 F.2d 621 and appears in the Appendix, *infra*, p. 1a. The opinions and orders of the United States District Court, unreported, appear in the Appendix, *infra*, pp. 5a, 47a and 60a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 27, 1973. A timely petition for rehearing *en banc* was denied on August 2, 1973, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

1. Do federal courts have the power, pursuant to 42 U.S.C. §1983, to enjoin violation of constitutional rights that arise from the improper conduct of public or governmental functions, where those functions have been delegated to agencies that are nominally private in nature?

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were filed in the Eastern District: *The United States of America ex rel. Michael A. McLaughlin* v. *People of the State of New York, et al.*, and *The Legal Aid Society of the City of New York*, 73-C-55, and *Michael A. McLaughlin, et al.* v. *People of the State of New York, et al., and The Legal Aid Society, Criminal Defense Division of the City and State of New York*, 73-C-113. These three cases were consolidated below for purposes of resolving the issue contained in this petition.

Statutory Provisions Involved

New York County Law §722 (amended in 1966 as County Law 18-B) provides in pertinent part as follows:

> . . . the governing body of the city in which a county is wholly contained shall place in operation throughout the county . . . a plan for providing counsel to persons charged with a crime, who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert, and other services necessary for an adequate defense. The plan shall conform to one of the following:
>
> • • • • •
>
> 2. Representation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operated to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel.
>
> • • • • •

New York City Mayor's Executive Order No. 178 provides in pertinent part:

> SUBJECT: FURNISHING OF COUNSEL TO INDIGENT CRIMINAL DEFENDANTS WITHIN THE CITY OF NEW YORK
>
> 1. Pursuant to the provisions of Article 18-B of the County Law (Sections 722-722a added by Chapter Section 78 of the Laws of 1965), I hereby designate the Legal Aid Society of the City of New York to furnish counsel to persons within the City of New York charged with a crime (as defined in County Law, Section 722-a) who are financially un-

able to obtain counsel within the meaning of County Law, Section 722. The terms and conditions for the rendition of such services, subject to the provisions of the foregoing statute, shall be as provided in an agreement to be entered into by the Society and the City; provided, however, that for the services to be rendered by the Society during the period from December 1, 1965, up to and including June 30, 1966, the City shall pay such Society the sum of Three Hundred Thousand ($300,000) Dollars, in such installments and at such time as shall be provided for in such agreement. This sum is in addition to the $400,000 heretofore paid by the City to the Society for the period from July 1, 1965 to January 30, 1966.

42 U.S.C. §1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Constitutional Provisions Involved

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

In July, 1972 seven indigent pre-trial detainees incarcerated in the Brooklyn House of Detention for Men filed this action on behalf of themselves and all other detainees confined pending trial in the Supreme Court of the State of New York on their respective indictments for the alleged commission of felonies. The amended complaint seeks declaratory and injunctive relief for systematic and widespread deprivation of constitutional rights. These include, *inter alia,* lack of the effective assistance of counsel, restrictions on access to the courts, failure to provide a speedy trial, coercion in obtaining guilty pleas, denial of reasonable bail and deprivation of due process and equal protection of the laws.

A motion to dismiss the complaint was denied by the District Court (Orrin G. Judd, J.) in part on February

15, 1973 and *in toto* on February 27. The order entered on February 27, 1973 was accompanied by a written opinion (App., *infra*, p. 47a). Extensive evidentiary hearings were held in the *Wallace* case and in the related *McLaughlin* actions on petitioners' allegations of a denial of effective assistance of counsel and of abridgment of access to the courts. On April 6, 1973, the District Court denied a motion by the respondent Legal Aid Society to dismiss the *McLaughlin* actions, holding that the organization and its attorneys were acting "under color of" state law within the meaning of 42 U.S.C. §1983.

On May 10, 1973, Judge Judd entered an order and a 57-page opinion granting petitioners' motions for preliminary relief (App., *infra*, p. 5a). The Court found that "[t]he Criminal Parts of the Kings County Supreme Court are in a state of deep crisis" and that "Legal Aid attorneys have excessive caseloads and that the conditions under which they must work are shocking"; the court concluded that excessive caseloads precluded Legal Aid attorneys from providing their indigent clients with the effective assistance of counsel required by the Sixth and Fourteenth Amendments.

The record upon which Judge Judd's judgment was based shows that during 1972 there were over 12,000 felony indictments in Kings County, of which 8,686 or 75 per cent (representing over 10,000 defendants) were assigned by the Supreme Court, Kings County, to Legal Aid. The District Court found that it was typical for an individual Legal Aid attorney to have between 80 and 100 active felony cases. As of March 1973 the average active caseload per Legal Aid lawyer was 94 cases. If those cases

awaiting grand jury action and sentencing are excluded, the average was 56.[2]

The Court found that all aspects of defense services to indigents were affected by the overload. The record amply demonstrated that Legal Aid attorneys were unable to properly investigate the facts of their clients' cases; rarely were able to visit their clients in jail and could not regularly communicate with them; were not able to do substantive legal research or to make appropriate pre-trial motions; and as a result were generally unable to prepare an adequate defense.

The order below was entered only against the respondent Legal Aid Society and not against the justices or clerks of the New York State Supreme Court.

The District Court, as noted herein, found that the Society acts under color of state law within the meaning of Section 1983. This conclusion is well supported by the record in this case and by an examination of the Society's function of providing indigent criminal defendants with legal representation.

The record below clearly shows the affinity between the Legal Aid Society and the State. Legal Aid represents criminally accused indigents pursuant to statute. (County Law §722 as amended in 1966 as County Law §18-B). The New York City Mayor's Executive Order 178 provides that an agreement be entered into between the Society and the City, which defines the precise manner in which the Society is required to perform its constitutional and statu-

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[2] App., *infra*, p. 8a. All factual material in the Statement of the Case is taken either from the opinion of the District Court or from the trial transcript.

tory functions. It is required to represent every indigent defendant assigned to it at every stage of any state criminal proceeding in New York City as well as being available for appellate remedies for other eligible applicants.[3]

Legal Aid depends almost entirely on government funds to finance its Criminal Defense Division. At least 82 per cent of its total funds for fiscal year 1972 were from governmental sources. Moreover, since June 30, 1972, an additional $6.7 million was appropriated by the City and State to provide increased funding for the Criminal and Supreme Courts through the creation of the Emergency Felony Processing Program. Part of that money was appropriated to increase the Legal Aid staff in conjunction with the establishment of new trial parts. Thirteen new Legal Aid attorneys were hired to cover four additional trial parts in the Criminal Term of the Supreme Court and another expansion of lawyers for six new trial parts was expected to go into effect in Brooklyn as of September 1973.

The Legal Aid Society has been and is an integral component in the planning and decision-making apparatus of the administration of justice in Kings County. The record is replete with testimony regarding Legal Aid's participation in criminal justice policy formation. The Society has regularly engaged in meetings with state and city officials regarding policy. It is a primary member of a special committee established by the Appellate Division of the Second Judicial Department to alleviate congestion in the city's detention facilities. It has engaged in numerous

[3] Legal Aid is not required to represent defendants accused of capital crimes or when there is a conflict between co-defendants.

conferences with the District Attorney and the presiding justices of the State Supreme Court to arrange the mechanics of hearing motions, to expedite massive bail review sessions, and to formalize plea bargaining practices. The Society originated a new "digital system" for improving continuity of representation; the system could only be implemented on an experimental basis with the cooperation of the courts and the District Attorney. In short, the Society is heavily involved in every aspect of the planning and administration of the Criminal Term of Kings County Supreme Court.

Based upon the District Court's findings of both the jurisdictional facts and the validity of the allegations as to the systematic lack of effective assistance of counsel, Judge Judd entered an order preliminarily enjoining[4] the Legal Aid Society

> from accepting any assignment after May 18, 1973 to represent an indigent criminal defendant in a felony case in the Supreme Court, Kings County . . . or from acting as attorney under any such assignment until and unless the attorney-in-charge of the Criminal Defense Division of said Legal Aid Society in Kings County shall file a certificate with the Clerk of the

[4] While the decision below arose out of the issuance of a preliminary injunction, the state action question discussed herein must be resolved before meaningful permanent relief can be fashioned. The question of adequate counsel is crucial to the resolution of petitioners' other causes of action currently pending in the court below. Petitioners are presently awaiting a decision from the District Court pursuant to hearings on the denial of speedy trial. If relief is forthcoming the need for providing indigents with effective counsel will become even more urgent. The petitioners anticipate a full trial on all of the other causes of action within the near future.

> Criminal Term of the Supreme Court, and with the District Court, certifying that the number of criminal cases pending in the trial part and assigned to the Legal Aid Society is less than a total of forty such cases for each attorney assigned to said parts and that in his professional judgment (after consultation with his supervisory staff in Kings County) the existing cases plus the assignment of additional cases to be anticipated in the next month will not exceed the capacity of said attorneys to give effective representation to the defendants.[5]

No other order was entered by the Court prohibiting or requiring any particular act or acts by respondent.

After the preliminary injunction was issued, the respondent requested an expedited appeal to the United States Court of Appeals for the Second Circuit. A judgment was entered on June 27, 1973, reversing the order of the District Court. The Court of Appeals in no way questioned the findings and conclusions of the District Court with respect to the lack of constitutionally adequate counsel. A petition for rehearing *en banc* was timely filed and denied on August 2, 1973.

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[5] The Court also enjoined the refusal of the Clerk of the Criminal Term to calendar motions filed *pro se* by indigent detainees. That aspect of the order is not at issue in this petition, nor is any other cause of action contained in petitioners' complaint.

REASONS FOR GRANTING THE WRIT

I.

Federal courts have the power pursuant to 42 U.S.C. §1983, to enjoin violations of constitutional rights that arise from the improper conduct of public or governmental functions, where those functions have been delegated to agencies that are nominally private in nature.

This Court has emphasized that since the 1870's federal courts have been "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States." Frankfurter and Landis, quoted in *Zwickler* v. *Koota,* 389 U.S. 241, 247 (1967) (emphasis added by Court). In meeting this responsibility the federal courts have not been restricted to jurisdiction over public officials and agencies. To realize the promise of the Fourteenth Amendment, federal jurisdiction has been conferred over persons who deprive others of their federally protected rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . ." 42 U.S.C. §1983. The Legal Aid Society operates "under color of" state Law, as that term has been construed by this Court. To permit the Court of Appeals' decision to stand is to allow the substantial erosion of established doctrines of jurisdiction.

This Court stated in *Evans* v. *Newton* that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." 382 U.S. 296, 299 (1966). In that case, the "public character" of a municipal park "require[d]

that it be treated as a public institution" even if managed by private trustees. *Id.*, 302. Similarly, private groups which control or administer part of the state elective process are subject to federal civil rights jurisdiction. *Terry* v. *Adams*, 345 U.S. 461 (1953).

Moreover, even conduct private in nature may become "state action" susceptible to federal jurisdiction if the state subsidizes it or is otherwise significantly implicated in that conduct. In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), racial discrimination by a private restaurant (co-defendant in the suit) was held to be state action where the restaurant leased space in a publicly owned building, revenues from such leasing constituted a major part of the facility's income, the restaurant and the publicly operated parking facilities enhanced each other's business, and the restaurant stood to gain from the Parking Authority's tax exemption. Similarly, state action was found in the discriminatory hiring and admission practices of private hospitals which were subsidized significantly from public funds and subject to certain official regulation as a result. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938. See also *Kerr* v. *Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945).

Under both these principles the Legal Aid Society operates under color of state law. Providing indigent persons accused of crimes with legal assistance is a function public or governmental in nature. The Sixth and Fourteenth Amendments mandate that criminal defendants in state prosecutions have the effective assistance of counsel; if they cannot provide it themselves, counsel must be appointed for them. *Powell* v. *Alabama*, 287 U.S. 45 (1932);

Gideon v. *Wainwright*, 372 U.S. 335 (1963); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). If a defendant is convicted of a crime and a prison sentence is imposed, the conviction must be reversed if the defendant was not accorded the effective assistance of counsel. Providing counsel for indigent defendants is thus as much a part of the state's administration of justice as the operation of a prosecutor's office and the selection of jury panels.[6] The fact that public officials may delegate this public and governmental function to a nominally private agency is of no significance. It is the nature of the activity, not the choice of means, that determines whether it is state action under *Terry* and *Evans*.[7]

Moreover, the role of the Legal Aid Society in the criminal justice system ". . . indicates that degree of state participation and involvement in [deprivation of rights] which it was the design of the Fourteenth Amendment to

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[6] See Chief Justice Burger's concurring opinion in *Argersinger* v. *Hamlin*, 407 U.S. 41, 44 (1972):

> "Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused."

[7] It was argued below that criminal defense is normally entrusted to the private bar. That contention would be irrelevant even if true. The function at issue is assigning counsel to defend indigent persons, which implicates the state no matter how it is done. (Cf. the statutory scheme, see text *infra*, which authorizes several alternative means of meeting the constitutional requirement.) But in any case, in Kings County, fully 75 per cent of all defendants in the State Supreme Court are represented by the Legal Aid Society. Moreover, the proportion of indigent felony defendants nationwide was estimated as 65 per cent of all felony defendants for the year 1971; and presumably most of these persons were represented by publicly appointed counsel. The Other Face of Justice: Report of the National Defender Survey, National Legal Aid and Defender Association (in press).

condemn." *Burton* v. *Wilmington Parking Authority, supra* at 724. The Legal Aid Society represents indigents under a contract with the City of New York, made pursuant to New York County Law §722 (revised, 1966, as County Law §18-B) and the New York City Mayor's Executive Order No. 178. Cases are, of course, assigned to the Society by the state courts, and the Society has no discretion in selecting its cases. For the fiscal year ending June 30, 1972, the Society received 82 per cent of its funds from public sources. The Society's decisions to expand its programs or add new ones are made in cooperation with—and subject to the approval of—State and City officials. And as the State participates in the Society's planning, the Society has also been intimately involved in all phases of criminal justice planning in Kings County, including the development of the Emergency Felony Processing Program in the county and various other administrative efforts. The Society's actions thus implicate the State just as strongly as in *Burton* v. *Wilmington Parking Authority, supra.* Particular instances "can be determined only in the framework of the peculiar facts or circumstances present," *Burton, id.* at 725. Under the *Burton* logic, petitioners have shown such a great degree of involvement as to bring the Society's actions with respect to state purposes well within the ambit of state action.

Nothing in federal case law is to the contrary. In the court below respondent relied upon cases that have held that an attorney does not act under color of state law in the exercise of his professional judgment and in the professional attorney-client relationship even if he is publicly appointed, and therefore may not be sued for damages on a malpractice theory under the Civil Rights statutes.

See, e.g., *Espinoza* v. *Rogers*, 470 F.2d 1174 (10th Cir. 1972). These cases are irrelevant. Petitioners here seek no damages. More important, they do not charge any attorney with incompetence or with negligence in representing a particular criminal defendant. They do not seek a federal forum for malpractice suits. Petitioners allege—and the District Court found—a widespread pattern of ineffective representation which affects an entire class and which is caused largely by the excessive caseloads the Society requires its attorneys to handle coupled with an absence of adequate investigative and supplementary services. Petitioners seek declaratory and injunctive relief, such as the District Court granted, to assure their class of effective representation in the future. That is, petitioners challenge the Society in its performance of the public function of providing counsel; they do not challenge the discretionary acts of the Society's attorneys as they adapt to the conditions of their work.

Lefcourt v. *Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971), is equally inapposite, and the panel of the Court of Appeals erred in relying on it. In *Lefcourt* an attorney alleged that he had been improperly discharged by the Society. He did not challenge the representation rendered by the Society to indigents. The Court of Appeals held that "the hiring and firing practices of the Society as they relate to this case do not involve the manner in which the Society carries on its public function." *Id.* at 1156. Shortly thereafter, the same court underscored the *Lefcourt* distinction in holding that a process server, though a private person, acts under color of state law in discharging his duties: "Furthermore, it is significant that this case directly involved defendants' mode of conducting this public func-

tion, and does not involve a collateral aspect of [their] business." *United States* v. *Wiseman*, 445 F.2d 792, 796 (2d Cir. 1971).[8]

The Court of Appeals' holding in the instant case has thus gone far to erode the doctrines of this court under *Terry* v. *Adams*, *Evans* v. *Newton*, and *Burton* v. *Wilmington Parking Authority*, all *supra*. What it suggests is that the state may evade effective federal review, and wronged persons may be deprived of their right to a federal forum, when the State delegates public or governmental functions to nominally private agencies. It also suggests that the State can subsidize these agencies, exercise significant control over their activities, collaborate with them in planning and policy decisions, and then disclaim responsibility for the consequences. This cannot be permitted. Petitioners have been deprived of federally protected rights by the joint activities of the State and the Legal Aid Society. They have a right to choose a federal forum in order to fashion meaningful relief.[9] To allow the decision below to stand not only prevents meaningful relief for the deprivation of effective counsel and impedes the resolution of petitioners' other causes of action. It casts a cloud over the policies of federal civil rights jurisdiction and threatens the federal defense of Fourteenth Amendment guarantees.

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[8] It is noteworthy that public support for the Legal Aid Society, official influence over its policies, and its intimate involvement in criminal justice planning have all increased dramatically since *Lefcourt* was decided.

[9] The District Court observed that denial of the effective assistance of counsel is available as a defense in a state criminal prosecution, but added: "However, in view of the allegations that appointed counsel rarely are prepared adequately and seldom present available defenses, it would ignore reality to leave claims to consideration in individual cases." Opinion, February 27, 1973, pp. 11-12 (App., *infra*, p. 54a).

II.

This case is important because it raises crucial questions about the realization of the Sixth Amendment right to counsel for indigent criminal defendants in urban judicial systems. If the District Court cannot fashion equitable relief applicable to the institutions of criminal justice, petitioners will be left without an effective remedy in the face of a wholesale denial of their rights.

More than ten years ago this Court held unanimously that a defendant accused of a serious state or local crime is entitled to the assistance of counsel. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938), the Court noted that the assistance of counsel

> is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards be lost, justice will not 'still be done.' 372 U.S. at 343.

The Court then concluded that it is made obligatory upon the states by the Fourteenth Amendment. The importance of counsel was underscored in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1973), which extended the right to those sentenced to prison for misdemeanors or petty crimes.

The right to counsel, of course, implies the *effective* assistance of counsel. The State's duty to provide counsel "is not discharged by an assignment . . . under such conditions as to preclude the giving of effective aid in the preparation and trial of the case." *Powell* v. *Alabama*, 287 U.S. 45, 71

(1932). This is precisely the situation found by the District Court below: the excessive caseloads of Legal Aid attorneys, coupled with the lack of investigative services and other necessary defense resources, preclude the Society from meeting the constitutional standard of effective representation. This is not the problem of one or ten or fifty defendants; it affects thousands of present and potential members of petitioners' class. Hence it is imperative that this Court carefully scrutinize the jurisdictional bar raised by the Court of Appeals, which felt "constrained to reverse on the law" despite its expressed sympathy with the purposes of the District Court's order. To let the *per curiam* judgment below stand, in the face of the District Court's unchallenged findings on the merits, is to deprive petitioners of the possibility of meaningful relief to vindicate their Sixth Amendment rights.

The situation takes on particular urgency when viewed in the light of this Court's decisions in *Gideon* and *Argersinger, supra.* These cases affirm the necessity of providing counsel for indigents as a basic safeguard for fairness in criminal proceedings. The decision below allows this Court's mandate to be nullified by an administrative device. It implies that states can delegate the duty of providing counsel for indigent defendants to a nominally private agency (albeit one which is substantially controlled by the State and participates fully in State planning and policy-making), and thus immunize this constitutionally mandated function from federal judicial review. The right of indigents to effective legal representation would then be subject to the State's financial exigencies and administrative pressures. If *Gideon* and *Argersinger* are to be taken at their word, this situation cannot be tolerated.

The gravity of the question is underscored by the fact that deprivation of the right to counsel is particularly difficult to remedy on an individual basis. Inadequate counsel is unlikely to raise the issue of inadequate counsel at trial.[10] Post-conviction remedies are also insufficient. Indigent state prisoners are not assured of receiving effective legal assistance after conviction, especially for collateral or federal remedies. In any case the standards of appellate review are rigorous for claims of ineffective counsel. *United States ex rel. Marcelin* v. *Mancusi,* 462 F.2d 36, 42 (2d Cir. 1972). Even a criminal defendant whose conviction is reversed due to inadequate counsel suffers irreparable harm in the meantime, especially if imprisoned. Class-based and prospective relief, under the traditional equitable powers of the District Court, offers the only practical redress for the wrongs complained of.[11] Petitioners have in fact been left without an effective remedy by the Court of Appeals' ruling.

The ruling below also draws an artificial distinction between the public and private participants in criminal justice administration. This distinction is not only jurisdictionally improper, but also reflects an unrealistically fragmented view of the problems of urban judicial systems in Kings County and elsewhere. High crime rates and inadequate resources combine to create systems of assembly-line justice for indigents, systems whose object becomes the processing of poor people and the administration of guilty pleas. The presumption of innocence, the constitutional rights of

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[10] Indeed, Samuel Dawson, an Assistant-Attorney-in-Charge of the Brooklyn Legal Aid office, an official of the Society, testified to the fact that Legal Aid attorneys never raise this issue at trial.

[11] Prospective class-based relief in the pretrial stages also is a means of lessening the burden of post-conviction proceedings in both state and federal forums.

defendants, and ultimately respect for law and the rehabilitative ideal are the inevitable casualties. Indigent defendants suffer patterns of interrelated wrongs involving complex relationships among courts, police, jails, social services, and defender agencies. To exclude one party in the system from the courts' purview is thus impractical as well as jurisdictionally infirm. It is destructive to enlightened efforts to fashion relief that has a realistic chance to meet its aims.

For these reasons the issues raised herein are of crucial importance not only to petitioners but to indigent criminal defendants generally. They go to the ability of the federal courts to keep the promise of *Gideon* and *Argersinger* and to ensure fair treatment for poor people in criminal prosecutions.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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October 1973

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1066-1068—September Term, 1972.

(Argued June 27, 1973 Decided June 27, 1973.)

Docket Nos. 73-1826, 73-1830-31

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

MICHAEL KERN, et al., etc.,

Defendants.

THE UNITED STATES OF AMERICA ex rel. MICHAEL A. MCLAUGHLIN, et al.,

Plaintiffs-Appellees,

v.

PEOPLE OF THE STATE OF NEW YORK, et al.,

Defendants,

and

THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK,

Defendant-Appellant.

MICHAEL A. MCLAUGHLIN, et al.,

Plaintiffs-Appellees,

v.

PEOPLE OF THE STATE OF NEW YORK, et al.,

Defendants,

and

THE LEGAL AID SOCIETY, CRIMINAL DEFENSE DIVISION OF THE CITY AND STATE OF NEW YORK,

Defendant-Appellant.

Before:

LUMBARD, HAYS and TIMBERS, *C.JJ.*

Appeal from an order of the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge,* preliminarily enjoining the Appellant Legal Aid Society from, *inter alia,* accepting or acting upon additional assignments of felony cases in Kings County Supreme Court so long as the average caseload of its attorneys in the trial parts of such court exceeds 40 and which directed the Clerk of the Criminal Term of the State Supreme Court to place on the court's calendar all pro se motions which have been filed by the inmates of the Brooklyn House of Detention.

Reversed.

ARTHUR L. LIMAN (Patrick M. Wall, Allan L. Gropper, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, on the brief), *for Appellant Legal Aid Society.*

HILLEL HOFFMAN (Joel Lewittes, Assistant Attorney General, Samuel A. Hirshowitz, First Assistant Attorney General of New York, New York, on the brief), *for Appellant Judges and Court Personnel.*

MICHAEL A. MCLAUGHLIN, *pro se.*

JAMES REIF (Daniel L. Alterman, Robert Boehm, William Kunstler, Center for Constitutional Rights, Stephen M. Latimer, New York, New York, Alvin J. Bronstein, Nancy Crisman, National Prison Project, Washington, D.C., on the brief), *for Appellees.*

LEWIS B. OLIVER, JR., New York, New York, *for Amicus Curiae Association of Legal Aid Attorneys of the City of New York.*

PER CURIAM:

This is an appeal from an order of the United States District Court for the Eastern District of New York, which preliminarily enjoined the Legal Aid Society of the City of New York from accepting or acting upon any additional assignments of felony cases in the Supreme Court of Kings County in New York if the average caseload of its attorneys exceeded 40. The district court also ordered the Clerk of the Criminal Term of the Supreme Court, Kings County, to place on the court's calendar all pro se motions filed by inmates of the Brooklyn House of Detention. The order directed the administrator of the indigent defense panel of Kings County to endeavor to make attorneys available to criminal defendants who are awaiting action by the grand jury and it ordered the Legal Aid Society

to continue to represent such defendants until new counsel were assigned by the Supreme Court.

Although the members of this court's panel were entirely sympathetic with the purposes which the district judge sought to accomplish by his order, we felt constrained to reverse on the law. Our opinion was delivered from the bench as follows:

> "We reverse and vacate the judgment of the district court.
>
> Very briefly stated our reasons are two-fold. In the case involving the Legal Aid Society we hold that the court has no jurisdiction under Section 1983 since the Society was not acting under color of state law, *Lefcourt* v. *Legal Aid Society,* 445 F.2d 1150 (2nd Cir. 1971). With relation to the order directed at the court personnel we hold that under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts. The mandate is to issue forthwith."

Reversed.

Memorandum of the United States District Court

(May 10, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72-C-898

DONALD WALLACE, . . . on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

MICHAEL KERN, *et al.*,

Defendants.

73-C-55

UNITED STATES OF AMERICA *ex rel.* MICHAEL A. MCLAUGHLIN, . . .

Plaintiffs,

—against—

THE PEOPLE OF THE STATE OF NEW YORK, *et al.*,

Defendants.

73-C-113

MICHAEL A. MCLAUGHLIN, . . .

Plaintiffs,

—against—

THE PEOPLE OF THE STATE OF NEW YORK, *et al.*,

Defendants.

Dated: May 10, 1973

JUDD, J.

MEMORANDUM

(On Motions for Preliminary Injunction)

On motions for a preliminary injunction brought by the plaintiffs in the two above entitled actions, the court has conducted hearings on three aspects of requested relief, (1) with respect to the excessive caseload of the Legal Aid Society, (2) with respect to the refusal of the Chief Clerk of the Criminal Term of the Supreme Court to place *pro se* motions on the calendar, and (3) with respect to the District Attorney's control of the trial calendar.

FACTS

The Wallace case is a civil rights action which the court has determined may be maintained as a class action on behalf of all felony defendants who are or may be incarcerated in Brooklyn House of Detention for Men (BHD) pending indictment, trial or sentence. The McLaughlin actions are brought *pro se* by inmate plaintiffs, also detained at BHD, and complaining, among other things that the Legal Aid Society is too overburdened to provide adequate representation, and that *pro se* motions which must be submitted for lack of assistance of counsel are not accepted. The McLaughlin actions, brought after the Wallace action, have not been determined to be class actions, although they are brought as class actions. Plaintiffs in the Wallace action have moved to join the City and the Appellate Division as parties defendant, and to consolidate the Wallace action with the first cause of action in the McLaughlin actions, in which the City (sued as The People of the City of New York) and the Appellate Division are defendants.

The Criminal Parts of the Kings County Supreme Court are in a state of deep crisis. The Deputy Director of Operations of the Legal Aid Society testified that "The system isn't working." It has not been shown that any individual judge or any Legal Aid attorney or Assistant District Attorney is failing to do his best under existing circumstances, but it is small comfort to a defendant in jail to be told that the fault lies with "the system." The extent to which a federal court can and should protect defendants from the effects of the crisis must be considered in the light of the facts disclosed by the testimony and exhibits that were offered in court.

Trial Delays

It is not unusual for defendants who cannot post bail to be held in custody for 12 to 15 months before their cases can be tried. There were 644 defendants who had been in the Brooklyn House of Detention for more than six months at December 31, 1972, and nearly half that number had been there over a year. A Legal Aid attorney testified that out of the last seven cases which he had tried in Kings County Supreme Court in early 1973, the defendants had been in jail for an average of 14 months, and two of them were acquitted. The Legal Aid Director of Court Operations testified on April 18, 1973 that the Society had recently obtained 12 acquittals of defendants who had been in jail from 12 to 14 months each.

When the court's Law Clerk assigned to this case visited the Supreme Court on March 26, 1973, he found that a typical calendar outside the Parts showed no trials scheduled which involved crimes committed later than 1971.

The Burden on Legal Aid

The Legal Aid Society represents 75 percent of all defendants accused of felonies in Kings County and approximately 90 percent of all those who are held in custody on felony charges. During 1972, Legal Aid was appointed to represent 8,698 defendants in felony indictments in Kings County. Ultimately 90 percent of all indictments are disposed of by plea bargaining, but only 4,587 cases were terminated during 1972.

The average Legal Aid attorney is employed by the Society when he graduates from law school, attends a 21-day training course, serves an apprenticeship of a few months in the Criminal Court, then begins trying felony cases in the Supreme Court, and leaves after about two years for other employment. The newly hired attorneys practice in the Criminal Court while awaiting admission to the bar, under the supervision of an admitted lawyer, pursuant to a special court rule.

The active caseload of Legal Aid attorneys varies from 45 to over 90 felony indictments per Supreme Court lawyer, according to the oral testimony. The documentary exhibits show that on January 8, 1973 Legal Aid had 4,518 cases pending in Kings County Supreme Court, of which 557 were awaiting grand jury action, 2,677 were assigned to Parts, and 1,284 were awaiting sentence. In March 1973 Legal Aid had 48 attorneys assigned to Kings County Supreme Court. Their average caseload was therefore 94 total cases, or 56 cases if those awaiting grand jury action or sentence are excluded.

The Attorney-in-Charge of the Brooklyn office of The Legal Aid Society wrote to the City-wide Attorney-in-Charge in September 1971 that no trial attorney could

handle more than 40 cases and cover arraignments and conferences. His assistant testified that 50 was the most one lawyer could handle, and that any increase in the caseload would erode the attorney's effectiveness on all his cases. One of the senior attorneys serving in the Supreme Court testified that he had a caseload of 91, and that he felt that 40 was near the limit of the number of files that he could handle adequately with proper attention to the defendant. Another attorney who had worked in the Legal Aid Society in the Supreme Court and then in the Community Defender Office and now in this court, stated that he estimated that a caseload of 30 to 35 was appropriate, in order to maintain a one-to-one relationship between attorney and client.

A private attorney said that he would not try to handle more than 25 to 35 active cases. The parties stipulated that three other members of the New York bar with from three to 17 years experience in criminal cases would give similar testimony.

Robert P. Patterson, Jr., former President of the Legal Aid Society, testified that he thought a fixed maximum was less important in criminal cases than in civil, because of the limited number of criminal parts available, but he admitted that Legal Aid has insufficient staff to cope with the present circumstances. He described the two years of constant urging which had been necessary since the surge of indictments began in mid-1971, to obtain the extra help which has now been promised for mid-1973. In two successive years he threatened to cancel the City contract if more help was not forthcoming.

A defendant in the Kings County Supreme Court will be represented during his case by a series of Legal Aid attorneys.

An experienced and dedicated Legal Aid attorney with a caseload of 40 to 45 felony indictments described the proceedings under which defendants are asked to accept pleas which may involve sentences of five years or even more. She said the third floor pen where she would meet a defendant for the first time (four floors below the courtroom where the plea negotiations take place) is "a horrendous situation, physically" an "absolute unbearable situation for Legal Aid" and "a humiliating experience for the defendant," with 40 people listening to the defendant's conversation with his counsel. She recognized that she could not adequately represent a defendant in such circumstances, and she would not have gone to trial under such circumstances, but said that it is a burden on Legal Aid to make trips to the jail. When a defendant whom she had met once and for whom she had negotiated a conditional 60-months sentence to the Narcotic Addiction Control Commission came up for sentence, she was busy on other matters in the courthouse and had to let another attorney appear for him, even though the Judge (as she had feared) refused to impose a NACC sentence and had the defendant reinstate his not guilty plea and go back to jail to await trial.

She testified that it is not unusual for a lawyer other than the one who appeared in the Conference Part to represent the defendant at the sentence. According to her, Legal Aid appears in Conference Part before it has prepared the case. The Conference Part, she stated, is for defendants who are guilty to plead at an early stage of the proceedings and there is no need to know about possible defenses. She did state, however, that the Legal Aid attorney in the Conference Part has a copy of the complaint, a criminal

court report, a synopsis of any preliminary hearing, and write-ups by previous Legal Aid attorneys who have interviewed the defendant.

Plaintiff Wilson testified that he was assigned a Legal Aid attorney when he was arrested, was interviewed for from two to five minutes in the bullpen with six or seven other prisoners in the same enclosure, that he was represented by another Legal Aid attorney when he was brought to court a few days later and was interviewed for two minutes in the bullpen. He further testified that he was returned to jail and did not see a Legal Aid lawyer for the next 45 days, although a law student interviewed him in jail. He filed a *pro se* motion after he had been in jail for 45 days without being indicted and received a reply from the Chief Clerk stating that the motion had been filed and forwarded to the Legal Aid Society. The motion was granted on June 7 by Mr. Justice Rinaldi, but Wilson remained in jail until June 27, after he had been indicted and was brought up for arraignment, represented by a different Legal Aid Society attorney. When the attorney went out for coffee, Wilson examined his folder and found a copy of an order directing his release, but no one had informed him of the fact, and the court told him that his release had been nullified by the subsequent indictment. When he was in court for conference in Part 1-A, he was represented by a different Legal Aid Society attorney who talked with him in the bullpen twice about offers of a plea to a three-year sentence and later to a one-year sentence, which he refused. He filed a *pro se* bail motion which was forwarded to the Legal Aid Society. He was in court around August 25th represented by a different Legal Aid Society lawyer, who offered him another plea without any interview. He submitted a letter to the court asking his

release and received a form reply from the Clerk. In late September, he found out through the Law Journal that his bail had been reduced to $500 and on October 2nd, it was again reduced to $100 cash, which was posted, permitting his release. He was next in court on December 27 represented by another Legal Aid Society attorney who was not familiar with the facts and told him that the court was just getting people there to mark their cases ready and passed or to take pleas of guilty. There had been no communication to him from the Legal Aid Society between October 3 and December 27 and no further communication up to February 22, 1973, when he testified in this court.

Before Wilson filed his first *pro se* motion, he was told by a Legal Aid attorney that a motion for release because of delay in indictment would be futile in view of a hold from the Narcotic Addict Control Commission; however, this does not explain why the order directing his release was not brought to his attention, especially in light of the fact that he was released from all custody when his bail was reduced in October.

Randolph Jenkins, another of the inmate plaintiffs, testified that he was assigned a Legal Aid attorney when he was arrested, had a different Legal Aid attorney when he appeared in court a week later, asked the Legal Aid attorney to check records at the police precinct but was told that the attorney would be unable to get them. He asked the right to have a private attorney, but when he was unable to obtain one, the court appointed another Legal Aid attorney. He was released in May 1971, indicted in June 1971, assigned another Legal Aid attorney and brought to trial in April 1972 with still another Legal Aid attorney, the trial resulting in a disagreement on one count and a conviction on another.

When the Law Clerk assigned to this case went into one of the Supreme Court Criminal Parts, selected at random, on March 26, 1973, after all the cases on the Ready Calendar had been marked "ready and passed," the Assistant District Attorney announced that he would proceed to trial on the Boone case. This was not on the calendar, but involved one of the defendants who had been granted the right to a speedy trial by the New York Court of Appeals in *People ex rel. Franklin* v. *Warden,* N.Y.L.J., Feb. 20, 1973, p. 1. Then the Legal Aid lawyer stated that he had just been informed of the trial date on the preceding Friday, and that he had not received a bill of particulars, explaining that he had just come into the case. When the Assistant District Attorney stated that his file contained no request for a bill of particulars, the Legal Aid attorney stated that the previous Legal Aid lawyer apparently had not served a demand. The fact that Legal Aid could not be prepared even on a test case which it had carried through the Court of Appeals tells volumes about the extent of its burden.

Citywide officials of Legal Aid oppose the setting of maximum caseloads because cases are not all alike and attorneys differ in ability, and the City might force the Society to treat any maximum as a minimum in fixing appropriations. One city-wide executive said he could prepare ten felony cases in a week. The statement, if true, would be an extreme example of accommodation to an unsatisfactory system. The court gives it no credence.

Even if a Legal Aid attorney has been assigned for a defendant in the Criminal Court, a new appointment is necessary in the Supreme Court after a defendant is indicted.

Frederick Cohen, a private attorney with six years experience, testified that when he represents a client he

always goes to the scene of the crime, attempts to use the client as an investigator if he is not in jail, in order to locate witnesses, that he files motions for bills of particulars, for discovery of exculpatory material, and for identification hearings if there has been a line-up, and that such motions not only help him obtain information but force the Assistant District Attorney to look at the case and perhaps consider a favorable negotiated plea. If there is a long delay in jail, the attorney brings a habeas corpus application. In connection with habeas corpus and bail applications, he interviews as many people as he can, not only to find the defendant's roots in the community but to identify possible character witnesses.

On the other hand, the head of the Brooklyn Legal Aid office testified that it is not a frequent occurrence for a Legal Aid attorney to see his client in jail while the case is pending, although paraprofessionals go to the jail every day to see if any inmate has any problem or to bring the Society's attention to anyone "who has been lost in the system." One of the senior attorneys stated that he goes to jail twice a month, but has to wait at least an hour to have his client brought down and cannot talk to more than two clients in a session. He would like to go out on his own investigations, but has no time because he could take all day on one case. He would like to look up cases and prepare affidavits in support of motions, but for lack of time submits mainly form motions. Questionnaires circulated on the seventh floor of the Brooklyn House of Detention showed that only one of 30 defendants represented by Legal Aid had received a visit from counsel, whereas five out of 15 with private attorneys had been visited.

The budget requests submitted to the City by the Legal Aid point out that lack of supporting personnel means that

attorneys earning higher salaries than aides must put in more of their time preparing a case, and that delays in reaching a case mean that more time must be spent than would otherwise be necessary, because the attorney and the client have to refresh their recollections and go over the same matter several times.

The seriousness of the problems of delay, and its long continuance, are shown by figures on the Kings County Supreme Court in Legal Aid's budget requests to the City for the fiscal year 1974. A comparison of intake of new cases with dispositions or output of old cases, gives the following figures:

	Intake	*Output*
Fiscal 1971	4,372	2,224
Fiscal 1972	7,259	4,657
Fiscal 1973 (projected)	8,480	3,896

The budget report states:

> The output-input relationship, which has increased from fiscal year 1971's level of 51% to fiscal year 1972's level of 64% has substantially dropped to 47.6% projected for fiscal year 1973. This is further evidence of the total breakdown of Supreme Court operations in Kings County.

The declining intake-output ratio reflects in part the dramatic increase in indictments in Kings County as reflected in the reports of the Judicial Conference of the State of New York:

July 1, 1969 to June 30, 1970	5,027
July 1, 1970 to June 30, 1971	7,291
July 1, 1971 to June 30, 1972	11,064

The evidence indicates a sharp decline (25% to 40%) in the rate of new indictments since January 1, 1973.

The Attorney-in-Charge of the Brooklyn office of Legal Aid wrote to the City-wide Attorney-in-Charge on October 31, 1972 that,

> I have found the majority of the staff here to be hard-working and conscientious. However, the backlog of cases and the consequent delay have completely undermined staff morale.

Legal Aid attorneys compare favorably with private attorneys both in quality of their work and in their results. Their acquittal rate is approximately the same as that of private attorneys. In the calendar year 1972, Legal Aid obtained acquittals in 39.1 percent of the cases that were decided by jury verdict, but there were only 140 trials out of 4,587 cases that were closed. The evidence at the hearings did not analyze the extent to which pleas of guilty may have been influenced by the improbability of a prompt trial.

In computing caseload, Legal Aid omits defendants who had a preliminary hearing and are awaiting grand jury action and also defendants who have been found guilty or pleaded guilty and are awaiting sentence. One witness stated that there is minimal work after the guilty plea if there has been a conditional agreement on sentence, although there is more if there has been a trial and a guilty verdict or a plea of guilty and no commitment concerning the sentence.

Pro Se Motions

The Court Clerk in charge of criminal motions testified that he receives from 25 to 50 *pro se* motions in an average

day, requesting such things as a bill of particulars, dismissal of indictment, suppression of evidence, and almost any other motion that an attorney might make. They are clocked in, checked against the docket, and if the movant is represented by counsel, the papers are sent to counsel and the movant is sent a form letter stating that *pro se* motions are not entertained and that the papers have been sent to his counsel.

The Clerk testified that there are from 25 to 70 motions on the motion calendar each court day and that calendaring *pro se* motions would mean a substantial increase in the number to be considered.

Although the instructions to Legal Aid Society personnel are to put a back on *pro se* motions and file them with the court, one of the Legal Aid Society attorneys testified that if they are busy, they just place the motions in their file. One attorney had "a stack" of unfiled motions when he left Legal Aid, according to the Assistant Attorney-in-Charge. It appears to the court that the vast majority of such motions are not placed on the calendar by the Legal Aid Society, regardless whether they are meritorious or frivolous.

It often takes more than a month to process a motion and get it to the Legal Aid office on the next floor of the courthouse because of unfilled vacancies in the Clerk's office. Legal Aid has not been able to establish any procedure for prompt pick-up of *pro se* motions.

Legal Aid witnesses testified that many *pro se* motions are frivolous, and some may contain information damaging to the defendant, but no instances of damaging information were proffered.

The policy with respect to *pro se* motions is based on a directive from Mr. Justice Miles McDonald on October 1,

1969 when he was the Administrative Judge, and when the burden on the Legal Aid Society was probably substantially less than it is today.

There are two exceptions to the policy of not entertaining *pro se* motions. Motions to relieve counsel will be placed on the calendar. Motions submitted to the Appellate Division and forwarded by that court will also be placed on the calendar, pursuant to the directions in a letter from the Clerk of the Appellate Division dated January 15, 1973, after the commencement of this law suit.

Calendar Control

The District Attorney's control of the calendar creates additional problems for Legal Aid because it is difficult to try a case properly on 24-hours notice.

A memorandum from the Associate Attorney-in-Charge of the Brooklyn office of Legal Aid to the City-wide Attorney-in-Charge pointed out that the practice of skipping down to Number 50 or 60 on the calendar for immediate trial of a case

> will play havoc with our staffing requirements above and beyond the problems of having to participate in a trial on such notice.

Legal Aid asserts that the Assistant District Attorney would often like to try his "best case", and consequently Legal Aid cannot be sure in what order cases will be reached. Where a case is triable, it is clear that forcing Legal Aid to crowd its final preparations into the weekend before the trial is prejudicial to the defendant. There are circumstances, such as unavailability of witnesses for either side, which make it difficult to follow an exact chronological order in the trial of cases even in Legal Aid Parts.

Shifting control of the calendar to the courts might create practical problems unless additional clerical staff were provided, in addition to filling vacancies. The Administrative Judge for the Criminal Parts of the Supreme Court was quoted as estimating that supporting personnel have accumulated $1,000,000 worth of compensatory overtime or postponed vacation time, in their efforts to cope with the problem. Lack of clerical staff was given as a reason why several trial parts must be closed during the summer, although Legal Aid asserts that it has attorneys ready to try jail cases.

Of the last six cases tried by Legal Aid in its Criminal Parts, one was the oldest jail case on the calendar, one was skipped over 13 older jail cases, one had never appeared on the ready calendar before it was moved for trial, another was jumped over 40 older cases, another was tried ahead of nine older jail cases, and the final one was Number 125 on the calendar.

The only Supreme Court Justice who testified, as a witness for plaintiffs, stated that although the Judges have legal control of the calendar, their power is not generally exercised in practice. The District Attorney chooses from the top 10 or 20 cases. Cases are marked ready and passed which are not really ready for trial. Recently the District Attorney has not departed as frequently from chronological order.

18-B Attorneys

The panel of attorneys under Article 18-B of the County Law includes a broad spectrum of the bar, but numbers of good attorneys have withdrawn from the panel because of the inadequacy of compensation. The maximum permitted by the legislature is still $15.00 per hour for work

in court and $10.00 per hour for work outside court. Even these figures are unrealistic, because the courts feel an obligation to the City to reduce the fees below the maximum.

One 18-B attorney who spent 302 hours on a seven-weeks trial was awarded only $3,000 by the trial judge, and this was cut to $1,500 by the Appellate Division, a rate of $5.00 an hour, or substantially less than a plumber or a TV repairman would receive.

According to one witness, 18-B attorneys almost never receive even the full hourly rate for their services. Fees of 18-B attorneys are a county charge, and are not limited by any budget figure.

The plan of the county bar associations requires seven years experience before an attorney can be put on the 18-B panel, unless he has had "exceptional experience." The testimony indicates that the attorneys on the 18-B panel are of about equal quality with Legal Aid attorneys. Their overall acquittal rate, according to the Administrator of the Indigent Defendants Panel, is 38.8 percent. They have tried about seven percent of their cases, a higher proportion than Legal Aid.

No funds are provided for recruitment, training or supervision of 18-B attorneys. The present panel could carry more cases than are now assigned, but not as many as would result if all Legal Aid assignments in the Criminal Court were temporarily interrupted. Unlike Legal Aid attorneys, 18-B attorneys and other private attorneys are hampered by the fact that they are prevented from interviewing their clients before they are arraigned in Criminal Court.

Studies of the Problem

There have been three recent inquiries into the legal representation of indigents in New York City. The first was

dated June 17, 1971 and was made by a "Subcommittee on Legal Representation of the Indigent" appointed by the Appellate Divisions of the First and Second Departments and including Hon. Robert L. Carter, then a member of the Mayor's Committee on the Judiciary and now a United States District Judge for the Southern District of New York, as Chairman; Hon. Alfred M. Ascione, Justice of the Supreme Court, New York County; Hon. Vincent A. Massi, former Assistant Administrative Judge of the New York City Criminal Court; Hon. Florence M. Kelley, Administrative Judge of the Family Court and former Attorney-in-Charge of the Criminal Branch of the Legal Aid Society; Hon. John C. Leonforte, Judge of the Civil Court; Hyman W. Gamso, Administrator of the Indigent Defendants' Legal Panel, First Department; Hon. Harold J. Rothwax, Judge of the Criminal Court and former Director of Legal Services for Mobilization for Youth, Inc.; Oscar Gonzales-Suarez, member of the Mayor's Committee on the Judiciary; Prof. Harry Subin of New York University School of Law, former Associate Director of the Vera Institute of Justice; Arthur C. Muhlstock, former Assistant District Attorney, New York County, and member of the Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York; Orison S. Marden, Esq., Chairman of the Board of Directors of the Legal Aid Society; Hon. David L. Malbin, Administrator of the Indigent Defendants Legal Panel for the Second and Eleventh Judicial District; and Joseph P. Hoey, former United States Attorney for the Eastern District of New York.

Among the primary recommendations of the Committee were continuity in representation of defendants and a determination of maximum caseloads for Legal Aid attorneys. The Committee recommended the use of paraprofessionals

in order to provide improved legal services, a step which is being taken.

With respect to the question of individualized responsibility, the Carter Commission stated (p. 10):

> The Society's practice of fragmenting its representation so that one defendant may have as many as 5 or 6 different attorneys during the course of his case is most undesirable and should be stopped. . . .
>
> Insofar as the Society is not meeting that standard, its performance is, we believe, inevitably deficient.

On the question of caseload, the Commission stated (p. 12):

> It would then, in our view, be appropriate for Legal Aid to decline to accept assignments over the number which it could treat in the comprehensive way here proposed. This may tend to cause some disruption in present procedures. We feel, however, that the alternative is a continuation of a type of representation grossly over-burdening to the Society, and which all, including the Society's attorneys, recognize as inadequate.

The Commission specifically recommended that the Appellate Divisions require the Legal Aid Society to determine a maximum lawyer-client ratio "beyond which it cannot provide effective representation," and that this determination "can be made without undue delay."

Nine months later, on April 17, 1972, there ensued a meeting of the Legal Aid Society with the Administrative Assistant to the Presiding Justice of the First Department, at which the Society stated that:

> All of the substantial recommendations of the report relating to the Society have either been fully implemented or are in process of implementation.

With respect to maximum caseload, it stated only that "the question of the caseload is complex" and that "the area should be intensively studied."

There followed in August 1972 a press release from the Appellate Divisions which described the Carter Commission Report as "a milestone in the progress of the administration of criminal justice" and said that "many of these recommendations have already been independently implemented by the Legal Aid Society as part of its current reorganization effort." The press release made no mention of the determination of maximum caseloads.

The second report was by Commissioner William J. vanden Heuvel, then Chairman of the Board of Corrections of the City of New York, dated March 25, 1973, and following two days of public hearings.

The report called attention to the difficulties encountered by defense attorneys visiting their clients at the jails, because of the delays which were involved, and referred to the hectic atmosphere and the lack of private interview facilities that resulted from the more convenient practice of interviewing clients at the courthouse. The report stated:

> This practice of courthouse interviews contributed to the alienation and anxiety felt by many incarcerated defendants who complained that they rarely have the opportunity to consult with their attorneys.

The report commented on the continuing necessity of fixing a maximum caseload for Legal Aid attorneys, stating (p. 26):

> As long as their caseloads remain at the present staggering levels, it is impossible for Legal Aid attorneys to form productive relationships with their clients, thoroughly investigate and prepare their cases, counsel their clients, and take an active role in the sentencing process. In short, an attorney with an active caseload of 100 felony cases cannot provide effective representation to his clients. Therefore, we recommend that maximum active caseloads be established by Legal Aid, beyond which it will refuse to accept cases. This proposal is not new.

The most recent report was issued in early April 1973 by the City's Executive Committee Criminal Justice Coordinating Council. The report, entitled 1973 Criminal Justice Plan, gave the Legal Aid Society high marks for reforms which had been instituted during 1972 and noted that the Society

> has removed itself as a potential bottleneck to speedy justice and efficiency in the criminal justice system, thus increasing its credibility among its clients and the public.

However, the report went on to note that significant problems remained, chiefly fragmented representation.

> An acceptable one-to-one relationship between client and attorney has yet to be developed. At present attorneys are assigned to court parts rather than to individual cases. Although this is a necessary budget-saving device, it hampers the intimate attorney-client relationship available to those who can retain private counsel. Moreover attorneys are unfamiliar with a case

until it is assigned to them in court. There is no time to order investigations or to fully prepare case arguments. Valuable court time is lost in this manner for all parties—judges, prosecution, attorney and client. Clients are reinterviewed as they pass from court part to part, from one attorney to another. The rapport between attorney and client suffers in this process, impinging adversely on plea-bargaining, trial strategy and sentencing decisions.

Steps Already Taken

Legal Aid has endeavored to obtain funding for increased staff from sources other than the City of New York. An Emergency Felony Case Processing Program is being funded by the State Division of Criminal Justice Services and the City of New York. A grant award was made by the New York State Division of Criminal Justice Services to assist in the creation of a prison paraprofessional unit within the Legal Aid Society of the City of New York. A grant award was made by the Division of Criminal Justice in the State Office of Planning Services for Legal Aid specialized units. Six new Criminal Parts will be opened in the Kings County Supreme Court, two in May and four in September.

A digital system has been instituted in Kings County Supreme Court so that a case will be assigned an indictment number even before the grand jury has acted and the final digit in the indictment number will determine which part the case will be assigned to and will permit the prompt assignment of a Supreme Court Legal Aid lawyer.

The Legal Aid staff in Kings County is expected to increase from 48 attorneys to 57 attorneys by the end of May 1973 and to 66 attorneys by September 1973.

Some jail cases have now been transferred to the Bail Parts, so that there is less risk of defendants on bail being tried ahead of older jail cases.

The District Attorney as well as Legal Aid would like to have more staff. With only two Assistants per part, it is difficult to have back-up cases if unexpected guilty pleas are received in those he has prepared for trial.

The testimony of a Supreme Court Justice was that the available facilities are not being used effectively. Although the District Attorneys are now moving cases more nearly in chronological order, he finds that almost a third of his time is wasted on logistics or waiting for a case that is ready for trial.

Discussion

Most of the issues of law presented in the case have been resolved in the earlier Memorandum and Order of Judge Weinstein dated July 11, 1972 and those of this judge dated February 15, 1973 and February 27, 1973 in the Wallace case and April 6, 1973 in the McLaughlin case. The major legal issues remaining for consideration are the requirements for a preliminary injunction, the standards of effectiveness of counsel, and the question of abstention.

Preliminary Injunction

The basic rule for the issuance of a preliminary injunction calls for a weighing of the probability of ultimate success against the relative hardships to the parties. *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595 (1969).

On the facts as developed at the hearings, the plaintiffs have a reasonable probability of success on all three issues.

There is obvious and irreparable hardship to criminal defendants in jail whose relief against impairment of constitutional rights is delayed. There will be no appreciable hardship to The Legal Aid Society in being prevented from accepting additional assignments for a period of time, and relatively minor hardship on the Court Clerks and the Judges in being required to consider *pro se* motions. Appointment of more 18-B counsel will cause some inconvenience to the Judges and Court Clerks, because such counsel will not be permanently assigned to a Part, like a Legal Aid attorney, and some calendar delays may result, but this factor is not sufficient to overcome the need for immediate relief.

Effectiveness of Counsel

The facts show that Legal Aid attorneys have excessive caseloads and that the conditions under which they must work are shocking. There is no proof, however, that their representation of any defendant on an actual trial or plea has been "farcical," one of the tests used to upset a conviction. The question at this time is not whether any verdict or plea may be upset because of ineffectiveness of counsel, but whether the practice of the state (and city) agencies charged with furnishing counsel meets the standards of the Sixth Amendment of the United States Constitution, and whether it would be fair or realistic to leave consideration of these claims for post-conviction adjudication in individual cases.

The right to be represented by counsel at all critical stages of a criminal prosecution is one of substance, not form. Long before the right to appointed counsel was extended by the decision in *Gideon* v. *Wainwright,* 372 U.S.

335, 83 S.Ct. 792 (1963), the Supreme Court recognized that the right to counsel would be meaningless if it did not require effective assistance and substantial aid. *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55 (1932). In a case later than *Powell, Avery* v. *Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 322 (1940), the Supreme Court said,

> [T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given assistance of counsel.

The right to the effective assistance of appointed counsel is not a welfare gratuity benevolently bestowed by an indulgent sovereign. The deliberate choice of an adversary system requires that both sides have professional and adequate representation. *See* American Bar Asosciation Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, pp. 2-6 (approved draft, 1971) (Providing Defense Services). Last term, the Supreme Court again recognized the importance of counsel in criminal prosecutions and extended the right to appointed counsel to all cases involving the possibility of a jail sentence. *Argersinger* v. *Hamlin,* 407 U.S. 25, 92 S.Ct. 2006 (1972). Both Chief Justice Burger (concurring) and Justice Powell (concurring in the result) reiterated that the adversary system functions best and most fairly only when all parties are represented by competent counsel. 92 S.Ct. at 2014-15, 2026.

Defendants have cited a long string of cases supporting their position that representation is constitutionally ade-

quate unless it is so woefully deficient as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. *E.g., United States ex rel. Marcelin* v. *Mancusi,* 462 F.2d 36 (2d Cir. 1972). All of the cases cited, however, involve post-conviction challenges, either direct or collateral, to the quality of representation. There are many good reasons for imposing such a stringent standard in individual cases after conviction. *See Brubaker* v. *Dickson,* 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied,* 372 U.S. 978, 83 S.Ct. 1110 (1963). It is easy for a convicted defendant to make unfounded allegations of incompetence and there is a natural temptation for a defendant to place the blame for conviction on his lawyer. A criminal trial or a guilty plea involves a great number of inter-related decisions and value judgments which may appear simple from hindsight but are difficult when made. This difference in prospect makes reviewing judges wary of substituting their view of the correct decision for the one made during pretrial preparation or in the heat of trial. There is also a strong interest in terminating litigation. This is especially so where there has been a guilty verdict after trial or where admissions of guilt have been made in response to the inquiry required when a guilty plea is entered. In the latter, the defendant in a federal court will most likely have answered "yes" to the question whether he was satisfied with the representation given him by his attorney.

None of the reasons which support the imposition of strict standards in post-conviction cases is applicable in the posture in which the question of adequate representation is presented here. The hesitancy to indulge in second-guessing previously made decisions is not an obstacle. What is in issue is not how to investigate, what plea to accept, which witnesses to call, what defenses to put forward, how to ex-

amine and cross-examine, but whether the Legal Aid attorneys are are so overburdened that they cannot even make the necessary decisions.

Although the court has determined that the adequacy of representation by The Legal Aid Society may be measured by a different standard, the post-conviction cases are instructive on the components of constitutionally sufficient representation. Lack of preparation, investigation, and consultation are ubiquitous complaints in the adequate representation cases. In *Braxton* v. *Peyton,* 365 F.2d 563, 564 (4th Cir.), *cert. denied,* 385 U.S. 939, 87 S.Ct. 306 (1966), for instance, the court stated that

> [T]he assigned lawyer should confer with the client without undue delay and as often as necessary, advise him of his rights, ascertain what defenses he may have, make appropriate investigations, and allow himself enough time for reflection and preparation for trial

Preparation and investigation must be more than perfunctory. Counsel has an affirmative duty to conduct appropriate investigations, both factual and legal. *Coles* v. *Peyton,* 389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80 (1968). A lawyer may not fabricate defenses, but must determine whether valid defenses exist. *Jones* v. *Cunningham,* 313 F.2d 347, 353 (4th Cir.), *cert. denied,* 375 U.S. 832, 84 S.Ct. 42 (1963). Failure to ascertain and investigate possible defenses has often resulted in a finding that the defendant was denied adequate representation. *See Goodwin* v. *Swenson,* 287 F.Supp. 166, 176-86 (W.D. Mo. 1968).

Consultation with the defendant to elicit information and to inform him of his rights is imperative. *Braxton* v. *Pey-*

ton, supra, 365 F.2d at 564. This is especially true where the defendant pleads guilty. *Windom* v. *Cook,* 423 F.2d 721 (5th Cir. 1970). Short and harried interviews in the courtroom have been discouraged. *Von Moltke* v. *Gillies,* 332 U.S. 708, 68 S.Ct. 316 (1948). The failure to investigate, research, and prepare is equivalent to no representation at all. *Brubaker* v. *Dickson, supra,* 310 F.2d 30; *Williams* v. *Beto,* 354 F.2d 698 (5th Cir. 1965); *Brooks* v. *Texas,* 381 F.2d 619 (5th Cir. 1967).

The Supreme Court in *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55 (1932), emphasized a number of factors relevant to adequate representation. The failure to appoint a single attorney with an individualized sense of duty to his client was highlighted. The Court also mentioned the need for step-by-step consultation with the client and thoroughgoing investigation and preparation.

A number of the standards endorsed by the American Bar Association Project on Standards for Criminal Justice are relevant in measuring the adequacy of representation provided by the Legal Aid Society. Chief among these is the rule that a lawyer must not accept more employment than he can discharge within the limits of his capacity to give each client effective representation. [The Defense Function, § 1.2(d)]. A lawyer must establish a relationship of trust with his client [Section 3.1(a)]. The commentary to this section notes that building a relationship of confidence and trust is normally more difficult for the assigned attorney and requires repeated interviews to develop a working report. The interviews should be carried on in private and the lawyer must protest against barriers to the development of a reasonable lawyer-client relationship. [Section 3.1(c)]. The lawyer has a duty to keep his client informed of the developments in the case and the progress

of preparing the defense. [Section 3.8]. Section 4.1 outlines the duty to investigate, which exists regardless of the defendant's admissions or his desire to plead guilty. The commentary notes that the lawyer must employ ingenuity to locate witnesses and that the lawyer's duty is to determine from knowledge of all the facts whether the client is guilty in law, not in some moral sense. Investigation, moreover, is necessary, not only for trial preparation, but for intelligent plea-bargaining. In fact, plea-bargaining should not begin until after full investigation. [Section 6.1(b)]. Termination of the trial does not terminate a lawyer's duty, for the attorney has an important function in the sentencing process. [Section 8.1]. The importance of preparation to represent the defendant at sentencing, even after a guilty plea, is underlined by the showing in the record that sentences do not always conform to what was contemplated during the plea-bargaining process.

Comparing the level of representation now provided by The Legal Aid Society with the American Bar Association Standards, it becomes evident that the overburdened, fragmented system used by Legal Aid does not measure up to the constitutionally required level.

The overburdening of its attorneys is not the fault of The Legal Aid Society, and it may not prevent adequate representation being given in cases that are actually tried. It is important, however, that criminal defendants have the appearance of justice as well as having a coincidental right result in the end. As is stated in the Kerner Report, *Report of the Advisory Commission on Civil Disorders,* Bantam Ed. 1968, p. 337:

> The belief is pervasive among ghetto residents that lower courts in our urban communities dispense "as-

sembly-line" justice; and uneducated are denied equal justice with the affluent. . . .

The quality of justice which the courts dispense in time of civil crisis is one of the indices of the capacity of a democratic society to survive. To see that this quality does not become strained is therefore a task of critical importance.

Abstention and Comity

This court dealt with the doctrine of abstention recently in the Willowbrook case, where the state had failed to give adequate protection to persons in custody but was in the process of delayed correction of deficiencies. *New York State Association for Retarded Children, Inc. et al.* v. *Rockefeller, et al.*, 72-C-356, 72-C-357, Memorandum and Order dated April 10, 1973. The court there held that it would not abstain but would restrict relief to the most urgent items. This case is similar. It does not involve the constitutionality of state statutes, but practices by state and municipal officers that are violative of civil rights.

Where their is a present violation of constitutional rights, the hope of delayed correction by the state (or the city) should not stay the hand of a federal court. *Watson* v. *City of Memphis*, 373 U.S. 526, 532-33, 83 S.Ct. 1314, 1318 (1963); *Rozecki* v. *Gaughan*, 459 F.2d 6 (1st Cir. 1972). The state defendants, in a post-hearing brief which describes only the recent improvements in procedure and none of the facts concerning Legal Aid's overburden, request that the court abstain. The situation here is not comparable to *Kirstein* v. *Rector of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970), which the Attorney General cites. In that case, relating to the admission of women to

the University, the court approved a plan which had been proposed by the Board of Visitors of the University, and dismissed the case as moot. Prolonged stays in jail and inadequacies of legal representation are in a different category, and are only in the first stages of correction.

The Legal Aid Society urges that the court convene a meeting of all major participants in the Kings County Criminal Justice System, and call for the submission of a plan with objective criteria and goals, rather than issuing any order at this stage.

In the light of Mr. Patterson's testimony concerning the time which was necessary to accomplish his objectives at President of Legal Aid, the experience shown by the record concerning the delay between the increase in Kings County indictments and the increase in Legal Aid Staff, and the importance of determining whether Legal Aid can be prevented by contract from exercising the independent judgment of an attorney concerning the capacity of its staff to handle additional cases, the court considers that this is not a proper case to abstain, except in respect of the issue of calendar control. Other issues remain in both cases, which the court would willingly discuss at a conference with state and city officials, if that appears to be a useful course at the time.

This court's Memorandum and Order dated February 27, 1973 found that the comity doctrine as defined in *Younger* v. *Harris,* 401 U.S. 37, 91 S.Ct. 746 (1971), and subsequent cases would not bar injunctive relief. That discussion need not be repeated. However, while the court remains mindful of the limitations on federal court intrusion in a state's criminal justice system, it bears reiteration that the crisis situation in Supreme Court, Kings County, its long existence, and the failure of the state and city thus far to provide

effective remedies justifies federal court action. *Cf. Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691 (1962).

Maximum Caseload

The fact that the present caseload of Legal Aid attorneys is too high, appears clear from the testimony of witnesses for the defendants as well as for the plaintiffs and from all of the independent studies which have been made. City-wide officials of the Criminal Defense Division have insisted here, however, that a caseload limitation would be meaningless if additional court Parts are not added and calendar control reforms instituted at the same time. Other changes beside a caseload limitation are indeed necessary. Nevertheless, the first place to start is with the quality of representation under existing conditions, and this can be done only by applying the Standard that a lawyer should not accept employment beyond his capacity to handle effectively. The opposition to a maximum caseload may relate to the relations between The Legal Aid Society and its staff bargaining agent as well as to the rights of defendants.

There are difficulties in fixing a maximum caseload, and what is too high in one county may be manageable in another county. Some cases will require much more time than others and some attorneys will have a different mix of cases than others. Fixing an *average* caseload for Kings County and permitting Legal Aid to make adjustments within that average is an appropriate way to deal with the problem.

The maximum set now may be different from what could be managed if defendants did not stay in jail as long, if there were better facilities for interviews, if there were more adequate supporting services, and if problems of calendar control are resolved. The limit which the court fixes now may be changed in the future if experience or changed circumstances justify.

Determination of the maximum caseload is complicated by the fact that computations have been directed only to cases assigned to Parts, excluding the critical period between preliminary hearing and indictment and the period between guilty plea or verdict and sentence. Effective investigation need not wait for the return of an indictment, and on occasion may even prevent the client from being indicted. With the digital system which has been adopted, it should be possible for Legal Aid to assign a case to an attorney before indictment, so that investigation can proceed while trials and memories are fresh. Excluding cases awaiting sentence from the caseload is inconsistent with the constitutional requirement for advice of counsel at the time of sentence. *Carter* v. *Illinois,* 329 U.S. 173, 178, 67 S.Ct. 216, 220 (1946); *Mempa* v. *Rhay,* 389 U.S. 128, 88 S.Ct. 254 (1967); *United States ex rel. Diblin* v. *Follette,* 418 F.2d 408 (2d Cir. 1969). New York law permits defense counsel to file a presentence memorandum in all cases. C.P.L. §§390.40, 400.10.

As Dean Van Hoomissen of the National College of District Attorneys said at the National Judicial Conference on Standards for the Administration of Criminal Justice, with respect to the Standards Relating to Providing Defense Services (57 F.R.D. 229, 302):

> At sentencing, the ability of counsel to present to the court a plan or program will in many instances result in a deferred or a suspended sentence or probation, while the absence of such a program will often result in incarceration.

Since the testimony related the caseload only to the cases in the trial Parts, the court will use that category for its finding, but will require an overall evaluation by the

local attorney-in-charge before Legal Aid may accept any additional cases.

The court is convinced, and finds, that an average caseload of 40 felony indictments pending in a trial Part strains the utmost capacity of a Legal Aid attorney under existing conditions, that the present average caseload is substantially in excess of that number, and that acceptances of any additional felony indictments by Legal Aid would prevent it from affording its existing clients their constitutional right to counsel.

Legal Aid should not be permitted to accept assignments in any additional cases (except new charges against defendants already represented) until the average caseload of its attorneys assigned to trial Parts is below 40 *and* until the Attorney-in-Charge of the Brooklyn office certifies on his own professional judgment (after consultation with his Brooklyn supervisory staff) that the attorneys on his staff are able to give effective representation to the defendants they represent and to any net additions that may be anticipated within the next month.

It would not be proper to increase the Kings County staff by depleting other counties.

Relief of Legal Aid should become effective within about a week, since the parties and the Brooklyn Bar Association have already been notified of the likelihood of such action. The need for relief will not be obviated by the anticipated addition of new attorneys later this spring.

18-B Attorneys

Interruption of Supreme Court assignments to Legal Aid will mean that new cases must be assigned to 18-B attorneys. The evidence indicates that they are approximately equal in ability to the Legal Aid staff. The Administrator

testified that they can handle some additional cases. It should be possible to recruit enough additional members to the Panel at least to handle cases coming up before September, when it may be that additional staff will permit Legal Aid to resume accepting assignments.

There are means at hand of making service under Section 18-B more attractive to attorneys. It is no longer true as was stated in 1967, *People* v. *Perry,* 27 A.D.2d 154, 278 N.Y.S.2d 323 (Sup. Ct. N.Y. Co. and Kings Co. 1967), that $10.00 to $15.00 an hour is the same as the Criminal Justice Act rates, which were doubled in 1970. 18 U.S.C. §3006A(d). The continuing validity of the *Perry* guidelines even outside New York City was questioned as long ago as 1969. *People* v. *Wilson,* 60 M.2d 144, 302 N.Y.S.2d 647 (Co. Ct. Monroe 1969). The state courts may recognize the economic facts of law practice today by granting allowances for the full time necessarily expended on cases by 18-B attorneys. It is by no means certain that the Legislature will leave the compensation rate indefinitely at the present figure. An increase was recommended in 1971 and 1972 by a committee of the Association of the Bar of the City of New York. 28 The Record 68, 69 (1972).

In any event, difficulties in recruiting 18-B attorneys do not justify forcing Legal Aid to accept more clients than it can effectively represent.

Pro Se Motions

The Appellate Division, at least through a letter from its Clerk, has recognized that *pro se* motions should be placed on the calendar. Since *pro se* motions have been filed to some extent because of frustration at lack of communication with their attorneys, it is a denial of access to the courts to send motions to attorneys who do not pursue

them. Federal courts have forbidden state officials to screen applications made to the courts by persons in custody. *Johnson* v. *Avery,* 393 U.S. 483, 488, 89 S.Ct. 747, 750 (1969); *Beard* v. *Alabama Board of Corrections,* 413 F.2d 455 (5th Cir. 1969).

To the extent that there may occasionally be material unfavorable to a defendant in the motion papers, the principle of *Simmons* v. *United States,* 390 U.S. 377, 88 S.Ct. 967 (1968), may protect a defendant against its use at a trial.

The Clerk may require copies of the motion for both the District Attorney and the defense counsel, but he should proceed more promptly than has been the past practice.

If the relief given to Legal Aid by this decision results in more frequent communication with incarcerated defendants and reduces the need for *pro se* motions, defendants may seek modification of the order to be entered.

Control of the Calendar

It is not disputed that the Supreme Court Justices have legal power now to control the calendars in each Part. The efficacy of an order requiring that jail cases be tried in chronological order, a practice already mandated by New York statute, is uncertain. Any order would have to permit deviations for good cause shown, which would be difficult for a federal court to enforce, and might require daily intrusion into the functioning of the state court.

There is evidence that the matter of calendar control is under active consideration at various levels of the Judicial Conference. A recent case quotes the District Attorney as determined to try jail cases in order of indictment numbers. *People* v. *Ryan,* 72 M.2d 990, 991 (Sup. Ct. Kings Co. 1973). Immediate amelioration of the additional burden placed on

Legal Aid because a fixed order on the calendar is not followed can be achieved by cooperation between the Judge, the Assistant District Attorneys, and the Legal Aid Attorneys in the Parts.

For the present, the complexity of the problem and the corrective steps envisioned by the Judicial Conference dictate that the court abstain from any action on this issue.

Other Parties

Since the assignment of Legal Aid attorneys in Supreme Court requires a step separate from their appointment in the Criminal Court, it does not appear to be necessary or appropriate to issue any injunction against assignments by Criminal Court Judges at this time.

Granting an injunction against Supreme Court Justices would involve an unusual exercise of federal court power. If Legal Aid is enjoined from accepting assignments in excess of its capacity to provide effective representation, it is fair to assume that Justices of the Supreme Court will not force Legal Aid to disregard this court's injunction. Under the circumstances, it does not appear to be necessary or appropriate to issue any injunction against the Supreme Court Justices at this time.

The relief sought against the District Attorney relates only to calendar control, a matter on which the court has abstained for the present. Therefore, no relief will be granted at this time against the District Attorney.

The State of New York is named in the caption of the McLaughlin actions, but no showing has been made that this case involves an exception to the Eleventh Amendment prohibition of suits against a state. The state is considered not to be a party to the action.

The City of New York is a defendant in the McLaughlin actions, but no relief is asked against the City in the first and second causes of action. The Corporation Counsel was present at the beginning of the Wallace hearings as attorney for the BHD Warden and was present at most of the other hearings. No direct relief will be granted against the City in the injunction order.

The City will be affected by the injunction to the extent that representation of defendants by 18-B attorneys may cost more than their representation by Legal Aid. The court is satisfied that adequacy of legal representation must be determined by the attorney (Legal Aid) and not by the City's budgetary officers, and that indigents may not be deprived of proper representation because of the contract under which Legal Aid operates.

As Judge Kaufman has recently pointed out (*Prison: The Judge's Dilemma,* 41 Fordham L.Rev. 495, 516—1973), enforcement of constitutional rights requires that "the public [be] willing to pay the price of reform, and to commit adequate funds." Allocation of sufficient resources is necessary not only to assure fair treatment for those accused of crime, but also to make the criminal justice system work to the benefit of all. One of the primary functions of the system is to protect society against violence and crime. If the criminal courts are left to founder for want of public support, there is a real danger that crime will go undeterred.

Other Issues

Legal Aid has suggested that the next issue to be considered is the court practice of deferring suppression motions to the eve of trial, thus postponing a normally simple

inquiry which may result in either a dismissal of the indictment or a plea of guilty. This is another matter where a substantial degree of discretion must be left to the individual trial judge.

This court will make its own review of the pleadings before setting a hearing on any other features of the motions for preliminary injunction.

Consolidation

Legal Aid in its post-hearing memorandum recognizes that it received ample opportunity to respond to the issues raised in the Wallace case.

F.R.Civ.P. 42(a) states:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Having completed the hearing of the issues described above, with counsel in both cases represented, the court may properly enter a single order, without consolidating the actions *in toto*. The McLaughlin actions involve issues concerning minority representation in the staff of Legal Aid and in the 18-B panel which are not in the Wallace action, and other issues which it does not at this point appear appropriate to consolidate.

Class Action

Directing that the McLaughlin actions may be maintained as class actions would require, among other things,

a determination that the plaintiffs will fairly and adequately protect the interests of the class. F.R.Civ.P. 23(a)(4). While plaintiff McLaughlin's mental competence was proved by psychiatric testimony and his capacity to act on behalf of his co-plaintiffs was demonstrated by the papers which he prepared and by his conduct during the hearings (with some assistance from the attorneys for the Wallace plaintiffs), his record of prior controversies with court-appointed counsel led the court not to ask any uncompensated attorney to represent the McLaughlin plaintiffs. The possibility that McLaughlin may not stay much longer at BHD raises a further question as to the adequacy of representation which would be afforded the proposed class in the continued conduct of the McLaughlin actions by the named plaintiffs.

Motion to Add Defendants

The motion of the Wallace plaintiffs to join the City of New York and the Appellate Division as parties defendant was an oral renewal of a somewhat similar motion already denied in this court's Memorandum and Order dated April 2, 1973. Since no relief appears appropriate against either such defendant at this time, it would not be appropriate to decide the motion without a written showing of need, and it will be denied.

The fact that the injunction to be granted will run only against The Legal Aid Society and the Court Clerks does not indicate any allocation of culpability, but merely a determination of the most practicable way, consistent with a federal court's limited powers and in the interest of comity with state courts, to remedy two of the deficiencies which led a Legal Aid executive to testify, as quoted earlier, that "The system isn't working."

An order in conformity with this memorandum is being signed simultaneously, subject to modification in any respects that may prove necessary. The plaintiffs being presumptively indigent, and having their liberty at stake, should not be required to post any bond as a condition of the injunction.

ORRIN G. JUDD,
U.S.D.J.

Order Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Second day of August, one thousand nine hundred and seventy-three.

Docket Nos. 73-1826, 73-1830-1

DONALD WALLACE, *et al.*, on Behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

MICHAEL KERN, *et al.*, individually and as Justices of the Supreme Court of the State of New York, Kings County, EUGENE GOLD, individually and as District Attorney for Kings County, JOSEPH MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County, JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County,

Defendants-Appellants.

THE UNITED STATES OF AMERICA, *ex rel.*, MICHAEL A. MCLAUGHLIN, *et al.*,

Plaintiffs-Appellees,

v.

THE CITY OF NEW YORK, JOSEPH PARISI, Chief Clerk, Supreme Court, State of New York, GEORGE SPANAKOS, Administrator, State of New York, County of Kings,

Defendants-Appellants,

THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

Order Denying Motion to Dismiss (Wallace)

February 27, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DONALD WALLACE, *et al.*, etc.,

Plaintiffs,

—against—

MILES F. McDONALD, *et al.*, etc.,

Defendants.

JUDD, J.

In this civil rights action by state detainees, the court reserved decision on plaintiffs' motion to declare it a class action and defendants' motion to dismiss for lack of jurisdiction over the subject matter and failure to state a claim. F.R.Civ.P. 12(b). Defendants' motion was directed to the first amended complaint, but has been treated as applicable also to the second amended complaint, which is similar in nature.

The action was instituted by indigent state detainees, arrested or indicted for felonies and incarcerated in the Brooklyn House of Detention for Men, an institution of the New York City Department of Correction, on behalf of all those who are or will be so incarcerated. The defendants include substantially all the Supreme Court Justices in Kings County and the Administrative Judge, the District Attorney, the Commissioner of Correction, the

Chief Probation Officer, the Chief Clerk of the Supreme Court, and the Chief Clerk of the Criminal Term of the Supreme Court. The allegations of the complaint are set up as eight separate causes of action and assert:

1. That the Legal Aid Society is assigned to represent indigents in approximately 90 percent of the cases, with the result that it has such a staggering caseload that it cannot adequately investigate, prepare, or try the cases, listing 17 particulars in which assigned counsel have failed to give effective assistance.

2. That the constitutional right to a speedy trial is denied by delays in presenting cases to the grand jury, bringing cases to trial, and preparing pre-sentence reports which take from three to four months to complete.

3. That bail is denied where no imposition of money conditions is reasonably necessary.

4. That lengthy pretrial incarceration causes unnecessary loss of employment, financial hardship, and anguish to inmates and their families.

5. That the right of access to the courts is hampered by the refusal to consider *pro se* motions, which the Clerk sends to the same assigned counsel whose inadequate representation led to the necessity for making *pro se* motions, instead of placing them on the calendar for consideration by a judge.

6. That taking prisoners from jail to courthouse pens without producing them before the judge and failing to produce them in court when ordered creates further delays.

7. That plaintiffs are coerced to plead guilty and lose their constitutional right to a jury trial because of the

delays and hardships imposed by the other practices described in the complaint.

8. That there is discrimination against indigent defendants because the practices described result in their being treated more harshly than those who can afford private counsel.

Plaintiffs allege that there have been more than 25,000 felony indictments in Kings County in less than four years, that the class they represent consists of more than 1,000 members and is too numerous to join all potential plaintiffs, that the case involves common questions of law and fact which the named plaintiffs can adequately present, and that the defendants have acted on grounds generally applicable to the class.

Discussion

The facts stated in the complaint are of a nature which would generally be appropriate to consider in an action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

As stated in this court's Memorandum and Order dated February 15, 1973, directing a hearing on portions of the

motion for a preliminary injunction, jurisdiction in civil rights actions extends to any "usage" involving state action which defeats federal rights. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 162-70, 90 S.Ct. 1598, 1611-14 (1970). The complaint alleges a number of general practices and usages which affect various rights guaranteed by the United States Constitution.

1. The requirement that counsel be provided for indigent defendants, *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963), must mean that indigents should be supplied with effective counsel. *Anders* v. *California*, 386 U.S. 738, 87 S.Ct. 1396 (1967); *Brubaker* v. *Dixon*, 310 F.2d 30, 32 (9th Cir. 1962).

2. The right to a speedy trial, guaranteed by the Sixth Amendment, is a federal right applicable to the states. *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972).

3. Freedom from excessive bail is guaranteed by the Eighth Amendment. *Stack* v. *Boyle*, 342 U.S. 1, 72 S.Ct. 1 (1951). The Supreme Court has intimated that the Eighth Amendment bail provision is applicable to the states through the Fourteenth, although it has not been required specifically so to hold. *Schilb* v. *Keubel*, 404 U.S. 357, 365, 92 S.Ct. 479, 484 (1972).

4. The fourth cause of action may be no more than an elaboration of the third cause of action, but it is not necessary that each so-called cause of action stand on its own feet. The court may consider all relevant portions of the complaint, hear evidence pro and con, and decide to what extent any allegations have been sustained, and then consider the nature of any appropriate relief.

5. Refusal to consider *pro se* motions, especially when combined with the alleged assignment of ineffective counsel, may be an obstruction of the right of access to the courts. *Johnson* v. *Avery,* 393 U.S. 483, 485, 89 S.Ct. 747, 749 (1968); *White* v. *Ragen,* 324 U.S. 760, 762, n.1, 65 S.Ct. 978, 979 (1945); *Ex parte Hull,* 312 U.S. 546, 61 S.Ct. 640 (1941).

6. Taking prisoners to the courthouse unnecessarily may not in itself be a violation of any federal rights under the principles of *Sostre* v. *McGinnis,* 442 F.2d 178 (1971), cert. denied, 404 U.S. 1046, 405 U.S. 978, 92 S.Ct. 719 (1972). Likewise, failure to produce defendants in court when ordered may not violate any federal rights, since there is no clear allegation that the defendant justices took any significant steps in any trial without the presence of a defendant. However, where part of the complaint alleges pervasive delays in bringing defendants to trial, the allegation of irregularities in the transportation of inmates to the courthouse should not be considered *in vacuo* and the claim is not dismissible on the face of the complaint.

7. Coerced guilty pleas are invalid. *Machibroda* v. *United States,* 368 U.S. 487, 493, 82 S.Ct. 510, 513 (1962). As the Supreme Court said in *United States* v. *Jackson,* 390 U.S. 570, 583, 88 S.Ct. 1209, 1217 (1968),

> A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.

Defendants' assertion that inquiry into the alleged coercion of guilty pleas is barred by *McMann* v. *Richardson,*

397 U.S. 759, 90 S.Ct. 1441 (1970), is mistaken. *McMann* and the companion cases of *Brady* v. *United States*, 399 U.S. 742, 90 S.Ct. 1463 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790, 90 S.Ct. 1458 (1970), were concerned with collateral attacks on guilty pleas and resulted in a constriction of the scope of inquiry into a guilty plea. The challenge made by plaintiffs here does not seek to set aside individual guilty pleas but rather asks for prospective relief against a system which is alleged to be inherently coercive. In this respect the claim is similar to that made in *United States* v. *Jackson, supra,* 390 U.S. 570, 88 S.Ct. 1209, in which the Supreme Court held part of the Federal Kidnapping Act unconstitutional because it permitted imposition of the death penalty only upon a jury's recommendation and thereby made the risk of death the price of trial.

8. The right of indigent criminal defendants to be free of discrimination because of their indigency has been long recognized. *Mayer* v. *City of Chicago,* 404 U.S. 189, 92 S.Ct. 410 (1972); *Griffin* v. *Illinois,* 351 U.S. 12, 76 S.Ct. 585 (1956).

Defendants' Arguments

In a civil rights action there is no duty to exhaust state remedies. *Wilwording* v. *Swenson,* 402 U.S. 249, 92 S.Ct. 407 (1972); *Monroe* v. *Pape,* 365 U.S. 167, 183, 81 S.Ct. 473, 482 (1961).

Whether the allegations of the complaint can ultimately be proved is not important for the purpose of defendants' motions. Nor is it necessary to decide at this time whether abstention may ultimately be a proper exercise of discretion. See *Railroad Commission of Texas* v. *Pullman Co.,*

312 U.S. 496, 500-01, 61 S.Ct. 643, 645 (1941); *Moreno* v. *Henckel,* 431 F.2d 1299, 1307 (5th Cir. 1970); *Reid* v. *Board of Education,* 453 F.2d 238 (2d Cir. 1971).

The court is aware of the recent decision of the New York Court of Appeals reinforcing the Speedy Trial Rule of C.P.L. § 30.30. *People ex rel. Franklin* v. *Warden, Brooklyn House of Detention for Men,* N.Y.L.J. Feb. 20, 1973, p. 1. This decision may relate to the question of abstention concerning all or part of the complaint, or to the merits of some of the issues, but it does not affect the jurisdiction of the subject matter or the sufficiency of the complaint.

Nor is it necessary to decide now what relief may ultimately be appropriate, if any. The difficulty in fashioning equitable relief does not affect the sufficiency of the complaint. *Littleton* v. *Berbling,* 468 F.2d 389, 415 (7th Cir. 1972).

The relief requested here is not barred by the federal anti-injunction statute, 28 U.S.C. § 2283, because suits for deprivations of constitutional rights brought under 42 U.S.C. § 1983 are an expressly authorized exception to that statute. *Mitchum* v. *Foster,* 407 U.S. 225, 92 S.Ct. 2151 (1972). However, defendants argue that the court must decline jurisdiction based on principles of federalism and comity enunciated in *Younger* v. *Harris,* 401 U.S. 37, 91 S.Ct. 746 (1971), and its companion cases. In *Younger,* the Supreme Court held that federal courts may not enjoin pending state criminal prosecutions except under exceptional circumstances. *Samuels* v. *Mackell,* 401 U.S. 66, 91 S.Ct. 764 (1971), prevents circumvention of *Younger* through the expedient of seeking federal declaratory relief which might have the same effect as enjoining the state prosecution.

The plaintiffs do not seek to enjoin pending state prosecutions. Nor do they call into question the constitutionality of the substantive criminal statutes under which members of the class have been indicted. Two of the causes of action (three and four), which challenge the setting of excessive bail and the hardships of lengthy pretrial detention, present issues which could not be raised in defense of a criminal prosecution. See *Littleton* v. *Berbling, supra,* 468 F.2d at 408. So too the fifth cause of action concerning the refusal to docket *pro se* motions would be difficult if not impossible to raise in individual criminal prosecutions. The other causes of action alleging pervasive denial of the rights to a speedy trial and effective assistance of counsel are available as defenses in New York State criminal prosecutions. However, in view of the allegations that appointed counsel rarely are prepared adequately and seldom present available defenses, it would ignore reality to leave these claims to consideration in individual cases. As plaintiffs point out, ineffective counsel is not likely to raise the issue of ineffective assistance of counsel.

Therefore, since the action does not request the court to enjoin state criminal proceedings, it is not subject to dismissal based on *Younger* v. *Harris.* But even if enjoining state usages under the facts presented does fall within the proscription of *Younger,* the circumstances alleged here are so egregious and unusual to come within the exceptions outlined in *Younger.* See 401 U.S. at 46, 53, 54, 91 S.Ct. at 751, 755. They present a threat that, as stated in *Younger,* "cannot be eliminated by defense against a single criminal prosecution."

It is not necessary to decide now whether dismissal of indictments would be a violation of *Younger* v. *Harris,* or

whether directing the release of defendants would be an exercise of habeas corpus powers that requires exhaustion of state remedies under 28 U.S.C. § 2254(b). Compare *Littleton* v. *Berbling,* 468 F.2d 389 (7th Cir. 1972); *Mitchum* v. *Foster,* 407 U.S. 225, 240-42, 92 S.Ct. 2115 (1972). Even a proceeding cognizable in federal habeas corpus must sometimes be treated as a civil rights action not subject to exhaustion requirements. *Wilwording* v. *Swenson,* 404 U.S. 249, 92 S.Ct. 407 (1971).

Defendants rely further on the Tenth Amendment to the United States Constitution, which reserves to the states the powers not delegated to the United States by the Consitution. Since the Tenth Amendment did not deter the Supreme Court from finding federal court jurisdiction in the *Gideon, Adickes, Johnson* v. *Avery,* and *Wilwording* cases, among others, it is clear that it has no application here. There is no real similarity between this case and *Kail* v. *Rockefeller,* 275 F.Supp. 937 (E.D.N.Y. 1967), where a three-judge court refused to direct the governor and the legislature to provide for the election of eight additional Supreme Court Justices from Queens County.

Defendants argue that the first cause of action seeks to supersede bar association grievance committees and the Appellate Division in relation to misconduct of attorneys. This argument misconstrues the complaint. The attack is on the practice of the judges in assigning more cases than Legal Aid Society attorneys can effectively handle. It is quite possible to sustain the complaint without determining that there has been any wilful misconduct by any Legal Aid Society attorney.

Defendants further argue that the complaint is too broad and would involve the federal court in the day-to-day oper-

ation of the state courts. The complaint is no broader than the facts which are alleged, and which must be taken as true for the purpose of defendants' motions. If separate narrow complaints would each be valid, a broad complaint combining a number of allegations should also be valid.

The Supreme Court has said quite recently that the purpose of the Civil Rights Act is to give federal courts power to deal with the day-to-day operations of state agencies and may invoke federal jurisdiction to remedy neglect as well as intentional misconduct. In *District of Columbia* v. *Carter*, 93 S.Ct. 602, 607 (1973), the Court stated concerning Section 1983:

> To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, *on a day-to-day basis,* over the actions of state officials. *The solution chosen was to involve the federal judiciary.* . . .
>
> . . .
>
> Thus, in the final analysis, § 1 of the 1871 Act may be viewed as an effort "to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect,* intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Monroe v. Pape, 365 U.S. at 180, 81 S.Ct., at 480. (Emphasis supplied.)

Defendants assert that the District Attorney and the Probation Department are not charged with any serious mis-

conduct. It is sufficient that some neglect of duty or participation in the delay of trials is charged against them. Moreover, some of the testimony at the hearings on a partial preliminary injunction charged the District Attorney with contributing to delays and to the inadequacy of defense representation by the way in which he manages the criminal calendars in the Supreme Court. Whether the charges can ultimately be proved is a matter for future determination.

Finally, the defendants point out that the State Supreme Court cannot be sued as an entity. *Zuckerman* v. *Appellate Division,* 421 F.2d 625 (2d Cir. 1970). This is not a case against the Supreme Court, but a case against individual justices and other state officials. As Judge Weinstein pointed out early in the case (Memorandum and Order dated July 11, 1972, p. 5), state judges are not immune from civil rights suits for equitable relief. See, *e.g., Jacobson* v. *Schaefer,* 441 F.2d 127, 130 (7th Cir. 1971); *Littleton* v. *Berbling, supra,* 468 F.2d at 395-408 (7th Cir. 1972).

Defendants Improperly Joined

This court may take judicial notice that, as the defendants assert, Mr. Justice Miles F. McDonald has retired, that Mr. Justice James S. Brown and Mr. Justice Thomas E. Morrissey, Jr. are not available for the trial of criminal cases; and that Mr. Justice A. David Benjamin and Mr. Justice Henry Martuscello are permanently assigned to the Appellate Division, Second Department.

The Class Action Motion

Defendants object to the granting of class action status because each plaintiff may not suffer from all the improper usages alleged in the complaint. This is not the test of the propriety of a class action complaint. It is sufficient for

Rule 23 that the class be numerous, that there be common questions of law and fact, that the claims of the representative parties are typical of those of the class, and that the representative parties will adequately protect the interests of all. Even if there are divergencies of view among the members of the class, it is sufficient if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." F.R. Civ. P. 23(b)(3).

The propriety of the alleged usages can best be determined in a class action, even though specific relief such as release on bail or dismissal of an indictment may depend on the facts in an individual case. *Cf. Brubaker* v. *Dixon, supra,* 310 F.2d at 32.

Class action status here is particularly appropriate, since plaintiffs are housed at the Brooklyn House of Detention for Men only temporarily and seek to represent those who may later be incarcerated there. A case dealing with an ever-changing class should not be defeated by the loss of some members and the entry of others. *Washington* v. *Lee,* 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333, 88 S.Ct. 994 (1968); *Clark* v. *American Marine Corp.,* 297 F. Supp. 1305 (E.D. La. 1969).

A major consideration in determining the adequacy of representation of a class is "that the parties' attorney be qualified, experienced, and generally able to conduct the proposed litigation." *Eisen* v. *Carlisle and Jaquelin,* 391 F.2d 553, 562 (2d Cir. 1968). The court is satisfied that plaintiffs' attorneys are competent to represent the class, and that the various requirements for the maintenance of a class action exist.

The most suitable basis for the maintenance of a class action in this case is under Rule 23(b)(2) in that "the party

opposing the class has acted or refused to act on grounds generally applicable to the class."

Plaintiffs should prepare a form of notice to be handed to present inmates of the Brooklyn House of Detention for Men and to all future inmates. The form shall be determined on notice to defendants' attorneys. Since an order for release of individual defendants or dismissal of indictments involves special problems, that portion of proposed relief should not be described in the notice. If it is appropriate, it can be granted under the prayer for other and further relief.

It is ORDERED:

1. That defendants' motions to dismiss the complaint be denied, except that the complaint is dismissed as to defendants Miles F. McDonald, James S. Brown, Thomas E. Morrissey, Jr., A. David Benjamin, and Henry Martuscello, and that their names shall be eliminated from the caption.

2. That defendants' time to answer the complaint be extended until thirty days after the date of this Memorandum and Order.

3. That plaintiffs' motion for a determination that the case may be maintained as a class action is granted, the form and manner of notice to the class to be determined by separate order to be submitted on three days' notice.

ORRIN G. JUDD
U.S.D.J.

Order Denying Motion to Dismiss
(McLaughlin)

April 6, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-C-55
73-C-113

MICHAEL A. MCLAUGHLIN, *et al.*,

Plaintiffs,

—against—

THE CITY OF NEW YORK . . . THE LEGAL AID SOCIETY, *et al.*,

Defendants.

JUDD, J.

MEMORANDUM AND ORDER

Defendant Legal Aid Society has moved to dismiss the complaints against it for failure to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6).

The complaint in 73-C-55 asserts as a first cause of action that both The Legal Aid Society itself and the panel of attorneys assigned to indigents under Article 18-B of the County Law fail to consult with plaintiffs at their place of detention or to conduct any effective fact-finding and that The Legal Aid Society refuses to submit requested motions on behalf of the plaintiff class. The second cause

of action recites that the congested condition in the Kings County Supreme Court has forced Legal Aid attorneys to take a case load which precludes the necessary attention to individual defendants. The third cause of action recites that The Legal Aid Society's excessive burden makes it necessary for defendants to submit *pro se* motions which the Clerk of the Criminal Term, also a defendant, refuses to accept.

The complaint in 73-C-113 asserts in its first cause of action that The Legal Aid Society and others are responsible for protecting indigent defendants' state and constitutional rights; that there have been various systematic violations of the legal and constitutional rights of persons accused of felonies, including forcing them to depend on inefficient and inadequate attorneys and condoning practices of court assigned counsel which are contrary to the canons of professional ethics; that counsel assigned through The Legal Aid Society fail to consult with their clients or to formulate effective and adequate defenses; and as a second cause of action that The Legal Aid Society fails to assign more black and Puerto Rican attorneys to indigent defendants.

Both actions are described as class actions on behalf of all indigent incarcerated defendants indicted for felony in the County of Kings. Thus they supplement a prior pending action in this court, *Wallace, et al.* v. *Kern, et al.*, 72-C-898, which was granted status as a class action by Memorandum and Order dated February 27, 1973 (after the filing of the two captioned McLaughlin actions). The present actions seek injunctive relief, and not damages.

The facts alleged in the complaints must be taken as true for the purposes of this motion . In a *pro se* prisoner

action, the complaint need not be as precise in their allegations as might be demanded of experienced attorneys. *Haines* v. *Koerner*, 404 U.S. 519, 92 S.Ct. 594 (1972).

The Legal Aid Society relies on the cases which have held that an attorney appointed to represent an accused in a state criminal proceeding is not acting under color of state law and therefore is not subject to suit under the Civil Rights Act. *E.g.*, *Espinoza* v. *Rogers*, 470 F.2d 1174 (10th Cir. 1972); *Brown* v. *Duggan*, 329 F.Supp. 207 (W.D. Pa. 1971).

Almost uniformly, the cases cited represent suits for damages against individual attorneys based on their acts in individual cases. Most of the cases simply state that the Civil Rights Act does not encompass tort actions for malpractice.

In none of the cases was there a request for equitable relief against concerted action among attorneys, state agencies and judges. The nearest example of such a case is *Palermo* v. *Rockefeller*, 323 F.Supp. 478 (S.D.N.Y. 1971), which related to non-compliance with an agreement to secure plaintiffs' release on parole. Judge Mansfield there refused to dismiss the complaint as against Parole Board officials and the Police Department representative, and granted leave to file an amended complaint against district attorneys and their assistants, although apparently not against *private* attorneys who had represented the plaintiffs, 323 F.Supp. at 486.

Significantly, Judge Masterson stated in *Myers* v. *Couchara*, 313 F.Supp. 873, 874 (E.D. Pa. 1970):

> We recognize that there may be cases where an attorney acts in conspiracy with state officers such that the

> attorney may lose his immunity to suit under the Civil Rights Act . . . This, however, is not such a case.

See also *Pugliano* v. *Staziak*, 231 F.Supp. 347, 351 (W.D. Pa. 1964), aff'd, 345 F.2d 797 (3d Cir. 1965).

In the present actions, the claims are not against individual attorneys, but against The Legal Aid Society itself, and against the City of New York and the judges who appoint attorneys for indigent defendants.

The court may take judicial notice that The Legal Aid Society is a not-for-profit corporation managed by a board of directors, few of whom represent indigent defendants in the Kings County Supreme Court, and some of whom are laymen. Moreover, as was made known in *Wallace* v. *Kern*, The Legal Aid Society is a party to a 1966 contract with the City of New York under which it has obligated itself to defend all criminal felony charges against indigents in New York City, including cases in the Kings County Supreme Court, and to provide the necessary services, and this obligation has been treated as binding on the Society even though the City may have failed to provide the Society with funds to employ an adequate staff.

The relation between The Legal Aid Society and the state in relation to staffing is also shown by the recommendations of a distinguished Subcommittee on Legal Representation of the Indigent, appointed by the Appellate Divisions of the First and Second Departments, whose report, dated June 17, 1971, is part of the record in *Wallace* v. *Kern* and also within the scope of judicial notice. This report recommended, among other things, that The Legal Aid Society should be required to determine the maximum lawyer-client ratio beyond which it cannot provide effective representation.

Whether a particular action is done under color of state law depends on a review of the circumstances in the individual case. *Burton* v. *Wilmington Parkway Auth.*, 365 U.S. 715, 725-26, 81 S.Ct. 856, 862 (1961). The Second Circuit has recognized the importance that a contract may have in deciding whether a "private" institution has acted under color of state law. *Powe* v. *Miles*, 407 F.2d 73 (1968).

Private parties who act in concert with state (or city) officers to deny federal rights are themselves subject to suit under 42 U.S.C. § 1983. *United States* v. *Price*, 383 U.S. 787, 794-95, 86 S.Ct. 1152, 1156-57 (1966); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). There was no state involvement in *Dreyer* v. *Jalet*, 349 F.Supp. 452 (S.D. Tex. 1972), on which defendant relies. That was simply an action by three prisoners to enjoin a VISTA lawyer from attempting to organize other prisoners in what the complaint described as an uprising.

By interposing itself as an agent of a municipality between the defendants and their right to counsel, The Legal Aid Society is so far involved with state action that it should not be immune from suit. Since it is under contract with a subdivision of the state to supply attorneys, it is acting under color of state law even though its individual attorney-employees are not.

Defendant also cites *Lefcourt* v. *Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971), which involved an attack by a Legal Aid attorney on the procedure of his discharge, an action which was not related to any provision of the contract between The Legal Aid Society and the City. The difference between these cases and *Lefcourt* is illustrated by Circuit Judge Moore's statement (445 F.2d at 1155) that

> there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs.

Lefcourt was decided after a full trial on the merits, the trial court finding it unnecessary to determine whether The Legal Aid Society "in the present factual context," could be classified as a state instrumentality (312 F.Supp. 1105, 1111). *Lefcourt* is not authority for dismissing these cases before the facts can be developed.

At the argument of this motion, plaintiff McLaughlin, who has been in punitive segregation during the past week, submitted for filing a hand-written motion for a preliminary injunction. In view of his difficulty in giving earlier notice, and in view of the fact that The Legal Aid Society has been aware for several weeks of the issues that are involved, it is appropriate to proceed promptly on this motion.

It is ORDERED that the motion to dismiss the complaint be denied, that defendants' time to answer the complaints be extended to April 12, 1973 pursuant to F.R.Civ.P. 12(a), and that plaintiffs' motion for preliminary injunction against The Legal Aid Society be heard on April 16, 1973 simultaneously with the hearing already scheduled in *Wallace* v. *Kern*, 72-C-898.

ORRIN G. JUDD
U.S.D.J.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-681

DONALD WALLACE, MICHAEL McLAUGHLIN, *et al.*,

Petitioners,

v.

MICHAEL KERN, THE LEGAL AID SOCIETY, THE PEOPLE OF THE CITY AND STATE OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT LEGAL AID SOCIETY

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT LEGAL AID SOCIETY

The Question Presented

Did the United States Court of Appeals, in a ruling which is in accord with the unbroken authority of six Circuit Courts and twelve District Courts, err in holding that a private defender organization, which is in no manner under state or city supervision or control, and which,

in defending indigents in the state courts, performs a function normally performed by private counsel, is not subject to suit and federal court supervision under 42 U.S.C. §1983?

Statement

The petition herein seeks to review an order of the United States Court of Appeals for the Second Circuit which unanimously reversed a preliminary injunction entered against The Legal Aid Society of New York City (the "Society"). The injunction, made in three consolidated actions brought in the Eastern District of New York pursuant to 42 U.S.C. §1983, among other things, restrained the Society from accepting or acting upon additional assignments of felony cases in the Supreme Court of Kings County, New York, so long as the average caseload of its trial attorneys in such Court exceeded 40, and subjected the Society to continuing federal court supervision concerning its acceptance of new assignments in the state criminal court.

The petitioners in this case have formulated an abstract question resting on a premise which is unsupported by the facts established below. Thus, the petitioners ask this Court to determine whether the federal courts "have the power, pursuant to 42 U.S.C. §1983, to enjoin violation of constitutional rights that arise from the improper conduct of public or governmental functions, where those functions have been delegated to agencies that are nominally private in nature." (P. 2)*

No such question is presented by the facts of this case. The record below, upon which the Second Circuit based its

* References are to the Petition for Certiorari.

decision, demonstrates that 1) the Society performs not a public or governmental function, but a function which has traditionally been performed by the private bar; 2) that the Society's only obligations are to the clients it defends, and that the very essence of its role as assigned defense counsel is to oppose the State, which it does with vigor; and 3) that, as the trier of the fact found, the Society's "attorneys compare favorably with private attorneys both in quality of their work and in their results." (P.16a)*

The Society has long been regarded as the very model of an effective and independent legal defense organization; and petitioners offered no proof, and the trier of the fact made no finding, to the contrary. If, as the petitioners urge, the Society can be said to perform a public or governmental function, then every private attorney who accepts an assignment from the state court to defend an indigent can be subjected to liability and supervision by the federal courts under Section 1983.

On the facts before it, the Second Circuit unanimously ruled that the Society's representation of indigents was not action "under color of state" law within the meaning of Section 1983, and that it was inappropriate for the federal court to exercise supervision over the Society's docket in the state court. The result was consonant with the decisions of eighteen other courts which have considered the status of independent legal service organizations under Section 1983. A contrary decision could not be justified by the proof in this case and would have per se subjected the Society and other assigned private counsel in the state criminal courts to continuous regulation, on a day-to-day

* References are to the Appendix to the Petition for Certiorari.

basis, by the federal courts with respect to their assignments; thrown open the doors of the federal courts to countless actions for damages under Section 1983 against assigned counsel by clients in the state court dissatisfied with the results in their case; and intruded deeply both on the power of the state courts to make assignments to provide the most effective representation of indigents, and on the authority of a private defender organization to manage its own affairs and to discharge its obligations to its clients free from interference by either state or federal officials.

The Second Circuit decision was clearly correct. Petitioners' quarrel is with the facts, which demonstrate the Society's independence. There is no issue of law to be brought before this Court.

The Proceedings Below

The three actions in which the preliminary injunction was entered were commenced by inmates in the Brooklyn House of Detention then awaiting trial on felony charges. The first of the actions, *Wallace, et al.* v. *Kern, et al.*, named as defendants all of the judges of the Kings County Supreme Court, other Court personnel, and the Kings County District Attorney. The Society was not a defendant. The complaint sought, among other things, an effective speedy trial rule, a declaration that the defendants' practices violated the Constitution, and an injunction requiring defendants to accord all indigents in state court their constitutional right to effective representation.

Postponing consideration of the request for an effective speedy trial rule, the Court proceeded to hold evidentiary

hearings limited to petitioners' application for preliminary relief against the judicial authorities, directing them to afford indigents more adequate representation in the state court. These hearings were later consolidated with hearings in the *pro se,* independently commenced *McLaughlin* actions, which named the Society as a defendant and sought similar relief.

Extensive proof was offered at the hearings concerning the cause of the calendar congestion in Kings County and the conditions under which the Society was required to labor. But no proof was offered by petitioners to support their contention here that the Society was subject to state or city control and all of the evidence confirmed that the Society is managed independently and that its attorneys' only duty is to their clients.

The District Court's Findings and Injunction

The District Court's principal opinion, filed simultaneously with its preliminary injunction against the Society, reflected a deep and justifiable concern over the then calendar conditions in the criminal courts in Kings County, a concern which the Court of Appeals shared. The District Court found that the criminal parts of the Supreme Court in Kings County were in a "state of deep crisis," attributable in large part to a "dramatic increase" in indictments without a corresponding increase in trial parts and other judicial resources. With the courts unable to try the burgeoning number of indictments, defendants often languished in jail for 12 to 15 months awaiting the trial of their cases.

In seeking relief under Section 1983 against the Society for the calendar conditions in the Kings County Supreme Court, the petitioners chose the wrong party, the wrong relief, and the wrong forum. As a private organization, the Society has and had no power to provide the additional judges and supporting facilities necessary to afford defendants their right to a fair and speedy trial.

The District Court was desirous of providing some relief for the crisis in the state court but, mindful of "a federal court's limited power," and in "the interests of comity," concluded that it should limit itself at the preliminary injunctive stage to relief against the sole private defendant, the Society.* Consequently, the Court could focus only on one of the effects, not the cause, of the calendar paralysis in Kings County—the backlog of immobilized cases assigned to the Society's attorneys. The Society had increased its staff in Kings County from 16 attorneys in December of 1971 to 57 by June of 1973. It had also filed numerous applications for speedy trial, and pressed appeals on this issue to the New York State Court of Appeals. But increases in the Society's staff and motions in individual cases could not eliminate the bottleneck of too few judges and courtrooms for too many cases, and the inventory of frozen cases awaiting trial remained.

The District Court found that there was no evidence that the Society was responsible for the log-jam, that any Legal Aid attorney was failing to do his best under existing circumstances (P. 7a), or that representation on an

* The District Court also enjoined the Court Clerks from failing to calendar *pro se* motions brought by indigent defendants. This aspect of the decree was also vacated by the Second Circuit, but it was not brought before this Court by petitioners. (P. 10, n. 5)

actual trial had failed to meet traditional standards of effective assistance of counsel (P. 27a). Indeed the District Court specifically found that "Legal Aid attorneys compare favorably with private attorneys both in quality of their work and in their results" (P. 16a).

Nevertheless, the Court ruled that in considering prospective injunctive relief under §1983, the "adequacy of representation by The Legal Aid Society may be measured by a different standard" than that utilized in post-trial *habeas corpus* petitions based on denial of Sixth Amendment rights to effective counsel (P. 30a). The Court found that prospective standard in the provisions governing "effective assistance of counsel" in the American Bar Association's *Project on Standards for Criminal Justice—The Defense Function* (1970). In so acting, the District Court also disregarded this Court's reluctance to lay down uniform prospective rules to govern Sixth Amendment rights. *E.g., Chambers* v. *Maroney,* 399 U.S. 42 (1970).

Measuring the Society against the ABA's *Standards,* and stressing the large number of cases awaiting trial, the Court concluded that "the overburdened, fragmented system used by Legal Aid does not measure up to the constitutionally required level" (P. 32a).

The relief which the Court fashioned fixed an average caseload of 40 for each of the attorneys assigned to the trial parts of the Supreme Court, and it added a requirement that new assignments could not be undertaken without the professional certificate of the local Brooklyn office chief. In such respect, the Court intruded deeply into the Society's internal affairs, shifting responsibility from its officials to the federal court for determining the staffing

needs of the Society in state court. To the extent that the Society was to be consulted on the subject, the Court bypassed the Society's principal officers, and lodged responsibility in the local office in Kings County to certify whether the Society could undertake further cases there.

Having postponed consideration of petitioners' request for a speedy trial rule, and choosing to grant relief only against a private organization with no power to command public resources for the courts, the District Court's order failed to act upon the heart of the crisis in the administration of justice in Kings County—the delay which pervaded all aspects of the criminal process there—even though it recognized that it would have to modify its injunction against the Society if "defendants did not stay in jail as long" (P. 35a). But the failure of cases to proceed to trial was not the result of caseloads of the Society, but of the lack of sufficient trial parts to keep up with the indictments. The decision did not and could not create one additional trial part, or advance the day on which a single case could be heard. The only effect of the injunction was to direct the division of the same quantity of the stacked-up cases for which trial parts did not exist among a greater number of lawyers.

The relief granted by the District Court was worse than cosmetic. Because of its unwillingness to act against the public officials who control the funding for assigned counsel, the District Court took no steps to assure that qualified private counsel would be available to provide representation for indigents whom the Society was barred from representing, and it rejected the prayer by the *Wallace* plaintiffs that the State be directed to provide the Society

with additional funds to increase the number of attorneys. Thus, the District Court's preliminary injunction had the unintended effect of relegating indigents to representation by private attorneys drawn from a panel who all witnesses agreed were not as effective and diligent as the Society's attorneys, and who could be paid only nominal fees for their services. And the ultimate irony was that these attorneys, who had to combine their private practices with their assigned cases, were in no way subject to the District Court's caseload limitation.

In granting the injunction, the District Court departed from an unbroken long line of decisions holding that independent defender organizations are not engaged in "state action" within the meaning of Section 1983. Its injunction, if upheld, would have had the effect of saddling the Society with mechanical and arbitrary caseload limitations stated as constitutional imperatives. If upheld, the order would also have required the Society, and all assigned defense counsel, to divert scarce resources to defending a flood of §1983 lawsuits seeking damages.

On the record before it, the Court of Appeals properly reversed this preliminary injunction, leaving it to the Society and its attorneys to make the professional judgment as to the number of cases that they could effectively handle. Subsequent to the Court of Appeals' decision, the Society created a formal mechanism to insure that it would not accept assignments which it could not effectively discharge, a matter which it had always attempted to assure by less formal methods.* At the same time, the number of indict-

* The question of the existence of a possible professional case overload is to be determined by a panel consisting of the Dean of Columbia Law School and the Presidents of the State and City Bar Associations. This mechanism was incorporated into an agreement with the Society's attorneys.

ments in Kings County has dropped and the average caseload handled by the Society's attorneys there is well below that set by the District Court. The question of caseload is, therefore, essentially moot.

ARGUMENT

I

The Circuit Court decisions are unanimous in support of the rule followed below that a private legal services organization "in no manner under State or City supervision or control," which performs a function "normally performed for and by private persons" does not act under color of state law within the meaning of Section 1983.*

Petitioners misconceive the function of assigned counsel when they state that they perform "public or governmental functions."

An attorney or defender organization which provides legal representation to a defendant in a criminal prosecution brought by the State owes his duty to his client, not to the State. His responsibility is to oppose the will of the

* The quoted words in this heading are from the decision of the Court of Appeals for the Second Circuit in *Lefcourt* v. *Legal Aid Society*, 445 F. 2d 1150 (2d Cir. 1971), at 1157, 1156. The *Lefcourt* decision, made after a meticulous review of the status of The Legal Aid Society, rejected the plaintiff's contention there that the Society acted "under color of" state law. The Court of Appeals in its decision herein found it necessary only to cite *Lefcourt* to reverse the order of the District Court. Although petitioners here assert that it is "noteworthy" that "public support for the Legal Aid Society, official influence over its policies, and its intimate involvement in criminal justice planning have all increased dramatically since *Lefcourt* was decided" (P. 16, n. 8), there is no indication in the record to that effect and the relevant facts are to the contrary.

State with every ethical and professional means at his disposal. Such action, whose very essence is adverse to the State, and which has traditionally been provided by private members of the bar, cannot be converted into "state action." Similarly, petitioners cannot find any support in the record herein for their contention (P. 16) that the State has "significant control" or "official influence" over the Society, or that the State's "intimate involvement" with the Society and its alleged "collaborat[ion]" with the Society "in planning or policy decisions" is such as to make the Society a state agent within the meaning of §1983.

"Public Function"

Petitioners contend that the representation of an indigent defendant by a court-appointed attorney or defender organization constitutes the performance of a "public" or "essential state function" within the line of cases represented by *Evans* v. *Newton*, 382 U.S. 296 (1966), *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953). This contention, that a private attorney becomes a state agent merely by acceptance of an appointment to defend an indigent, has been rejected by the unanimous authority of the federal courts in decisions of at least six Courts of Appeals and twelve District Courts. These cases have recognized that counsel for an indigent defendant is not an agent of the State whose responsibilities are to the State, but an attorney whose sole duties are to his client. The rationale underlying this principle was cogently set out by the Second Circuit in *Lefcourt*:

> "* * * the representation of persons accused of crimes, far from being the function of any agency which 'traditionally serves the community' is normally performed

> for and by private persons. Those who can afford their own counsel value the fact that their relationship with their attorney will be protected by the Courts through the attorney-client privilege. The person with a retained attorney knows that that attorney will use his best efforts consistent with ethics and law, and that no State official is in a position to alter this in any way. The City has sought to have the Society function under similar circumstances. Under the contract, the City retains few controls over the Society, and *the Society's obligation under the contract is to its clients and not to the City.*" 445 F. 2d at 1156 (emphasis supplied).*

The Second Circuit in *Lefcourt* also recognized that the duty of an attorney to oppose the State cannot be converted into state action on the theory that the State is *required to defend* indigent prisoners. As the Circuit there stated, it is the duty of the State not to defend an accused it is trying to put in jail, but to provide the means for a defense for those who cannot afford private counsel. No decision of this Court has implied otherwise.

Every other Circuit which has considered the status under Section 1983 of private and public defender organizations, as well as assigned counsel, has reached precisely

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* Petitioners try to distinguish *Lefcourt* (P. 15-16), and they contend that the Second Circuit, in its decision herein and in its unanimous refusal to rehear this case *en banc*, mistakenly relied on its own earlier opinion. Undoubtedly, the Court of Appeals understood its own prior decision as well as the clear distinction between *Lefcourt* and *United States* v. *Wiseman*, 445 F. 2d 792 (2d Cir. 1971), *cert. denied*, 404 U.S. 967 (1971), which held that the signing of a false affidavit of service of process by a process server was within "the narrow class of cases where state action can be found on the basis" of the "public function" theory. In *Wiseman* the Second Circuit specifically said: "*Unlike most functions involved in the conduct of a lawsuit by private parties*, the service of summons is essentially and traditionally a public function." 445 F. 2d at 796 (emphasis supplied).

the same conclusion. In *Espinoza* v. *Rogers*, 470 F. 2d 1174 (10th Cir. 1972), an action brought against Colorado public defenders, the Tenth Circuit found that a public defender's professional duties and responsibilities toward his client are the same as those of all other attorneys, and that public defenders in the office of the Colorado State Public Defender do not act under color of state law so as to be amenable to suit under Section 1983. In *French* v. *Corrigan*, 432 F. 2d 1211 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971), and *Mulligan* v. *Schlachter*, 389 F. 2d 231 (6th Cir. 1968), attorneys appointed by the state court to represent indigent defendants were held to have been appointed solely to serve the interest of the client, and thus not acting under color of state law.* Similarly, in *Thomas* v. *Howard*, 455 F.2d 228 (3d Cir. 1972), the Third Circuit concluded that an attorney appointed by the Court could not be sued under Section 1983. The Court ruled that, since the attorney was "* * * performing his duties solely for [his client], to whom he owed the absolute duty of loyalty, as if he were a privately retained attorney * * * [he] was not acting 'under color of state law, custom or usage' within the meaning of the Civil Rights Act * * *." 455 F. 2d at 229-30 (citations omitted).**

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* See also *Szijarto* v. *Legeman*, 466 F. 2d 864 (9th Cir. 1972) (attorney, whether retained or appointed, does not act under color of state law); *United States* v. *Senak*, 477 F. 2d 304 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 157 (1973), where the defendant public defender was indicted under 18 U.S.C. §242 on the ground that he had used his position to extort fees from the poor; the District Court had summarily dismissed for failure to show state action and the Seventh Circuit remanded for a factual hearing to determine the conditions which attached to the defendant's appointment as a public defender and the representations he made to his clients to exact fees from them; the "essential state function" theory was not relied on.

** The same conclusion—that defender organizations are not subject to Section 1983 since they do not act under color of state law—has been reached by the District Courts in a variety of suits brought

Petitioners attempt to belittle this line of authority, suggesting that there is a more permissive standard of jurisdiction under Section 1983 for injunctive relief than for damages (P. 15). But the touchstone of liability for both injunctive relief and damages under Section 1983 is the same: Was the defendant acting "under color of state" law? Since the Society was not performing a "public function" in defending its clients, there is no basis for an action against it under Section 1983.

"Involvement With the State"

After taking lengthy testimony subsequent to its initial order denying the Society's motion to dismiss for failure

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against attorneys under Section 1983, including a recent decision in an action strikingly similar to the instant case: *Gardner* v. *Luckey*, —— F. Supp. —— (M.D. Fla., Jan. 24, 1973, No. 71-561 Civ. T-K). There, plaintiffs, in an action under Section 1983 against the Public Defenders for two judicial circuits for failure to provide adequate representation, sought, among other things, a caseload limitation. Although the office of public defender was created by statute, and funded by the state, the Court held that those facts did not "endow such public defenders with the color of state law in representing their clients * * * nor immediately transform an attorney-client relationship into state action" (Opinion, p. 6). The Court concluded: "An attorney for an indigent defendant, whether court-appointed or a public defender, is not an officer or servant of the state. His duty is to *oppose* the efforts of the state to convict his client. His actions, good or bad, are not done for the state nor under color of any statute." (*Id.*, pp. 4-5) (emphasis in original). *See also*: *United States ex rel. Wood* v. *Blacker*, 335 F. Supp. 43 (D.N.J. 1971); *Pugliano* v. *Staziak*, 231 F. Supp. 347 (W.D. Pa. 1964), *aff'd per curiam*, 345 F. 2d 797 (3d Cir. 1965); *Wardrop* v. *Ross*, 319 F. Supp. 1299 (W.D. Pa. 1970), *aff'd per curiam*, 432 F. 2d 1049 (3d Cir. 1970); *Palermo* v. *Rockefeller, et al.*, 323 F. Supp. 478 (S.D.N.Y. 1971); *Wood* v. *Virginia*, 320 F. Supp. 1227 (W.D. Va. 1971); *Peake* v. *County of Philadelphia*, 280 F. Supp. 853 (E.D. Pa. 1968); *Vance* v. *Robinson*, 292 F. Supp. 786 (W.D.N.C. 1968); *Brown* v. *Duggan*, 329 F. Supp. 207 (W.D. Pa. 1971); *Reinke* v. *Richardson*, 279 F. Supp. 155 (E.D. Wisc. 1968); *Christman* v. *Pennsylvania, et al.*, 275 F. Supp. 434 (W.D. Pa. 1967), *cert. denied*, 393 U.S. 885 (1968); *Jackson* v. *Hader*, 271 F. Supp. 990 (W.D. Mo. 1967).

to show "color of state law" (which assumed petitioners' facts to be true), the District Court did not make a single finding supportive of petitioners' contention that the Society's "involvement" with the State makes it an agent thereof. The Court of Appeals, which had carefully "sifted the circumstances" and had reviewed the contacts between the State and the Society in the *Lefcourt* case, obviously rejected petitioners' contention that state "implication in" or "involvement with" the work of the Society transforms private conduct into state action. Yet petitioners again contend here, without any factual support, that the "affinity between the Legal Aid Society and the State" (P. 7) is such as to make the Society a state agent within the *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), line of authority.

As record support for the asserted "affinity" between the Society and the State, petitioners rely on New York State law, which requires the provision of defense counsel for accused indigents, and the contract between the City of New York and the Society under which the Society has undertaken to provide such representation. Petitioners also rely on the fact that various governmental agencies (state, city and federal) supply a very large percentage of the Society's operating funds, and that the Society's personnel serve on planning boards and have "regularly engaged in meetings with state and city officials regarding policy" (P. 8).

But the contract with the City recognizes explicitly that the Society "shall alone be responsible for their [its attorneys', investigators' and other employees'] work, and the direction thereof," and judgment as to staffing and handling

cases is left exclusively to the Society. Under its contract with the City, the Society has been the model of a private defender organization free from all vestige of state supervision and control, as this Court well knows from the number of cases the Society has brought before it.*

Similarly, petitioners confuse funding with control. By seeking and obtaining funds from the City, the Society does not submit to the control of its affairs—any more than the government controls our great private universities. See *Grafton* v. *Brooklyn Law School,* 478 F. 2d 1137 (2d Cir. 1973); *Grossner* v. *Trustees of Columbia University in the City of New York,* 287 F. Supp. 535 (S.D.N.Y. 1968). The Society has made continuing efforts to insure that its need for funds does not compromise its independence, and to this end it has expended millions of dollars of privately raised money on its criminal defense efforts.

The plaintiff in *Lefcourt* v. *Legal Aid Society,* who attempted to make a record which would show state control over the Society, wholly failed to do so. The plaintiff there, the Second Circuit concluded, had not established "that the City or any other governmental subdivision or agency had any right whatever to intervene in any significant way with the affairs of the Society with respect to its employment practices or otherwise." (445 F. 2d at 1155.) It further found that: "It cannot be said that the Society acts under

* In addition, the Society has now, or has had within the last year, lawsuits pending against the Governor, the Mayor, the Presiding Justice of the Appellate Division, Second Department, all the Judges of the Criminal Court of the City of New York, all the Justices of the Supreme Court of the State of New York authorized to sit in the First Department, the Police Commissioner, the Commissioner of Corrections of the City of New York, the Commissioner of Corrections of the State of New York, and numerous other public officials.

color of State law by virtue of the financial and other benefits which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs." (*Ibid.*) The petitioners in this case failed even to attempt to make a record below which would show state control over the Society, and their failure to do so makes it particularly inappropriate to grant certiorari in this action.

The emptiness of petitioners' claim of state action is best illustrated by their contention that the Society's involvement in "the planning and administration of the Criminal Term of Kings County Supreme Court" (P. 9) has compromised its independence. Petitioners cite such acts as participation in meetings and study groups for court reform under the auspices of the State Judicial Conference and the Appellate Division. If, as petitioners argue (P. 8-9, 13-14), it is "state action" to argue that the Supreme Court be kept open in the summer, and to offer to maintain Legal Aid parts at full staff; or to plead for more public funds so as to be able to hire more attorneys; or to urge that cases with retained counsel not be assigned to the Legal Aid parts; or to discuss techniques for disposing of more felonies at the Criminal Court level; or to seek to persuade the District Attorney to reduce bail demands; or to serve on a committee to recommend methods to alleviate overcrowded conditions in the jails; or to attempt to work out with the Appellate Division mechanics for bringing on speedy trial motions; or to devise methods for improving the continuity of representation of indigents

and for keeping track of Legal Aid cases after indictment—then every defense lawyer who seeks to promote the goal of a fair and speedy trial for his clients is vulnerable to an attack on his independence. The Society's continuing advocacy of reform—which petitioners see as proof of collusion—is in reality the best evidence of the Society's devotion to the interests of its clients. The record below fully supports the Second Circuit's conclusion in *Lefcourt* that:

> "Although the Society by contract has undertaken to make available to indigents legal services which otherwise governmental agencies might have to assume, its history, constitution, by-laws, organization and management definitely establish that it is a private institution in no manner under State or City supervision or control. *Its very independence from any such control is an assurance that those who receive the benefits of its services will obtain these services in accordance with the highest standards of the Bar.*" (445 F. 2d at 1157; emphasis supplied).

In sum, all of the lower courts which have considered the issue have concluded that assigned defense attorneys, who act independently and for the good of their clients, are not subject to suit under Section 1983. *Compare United States* v. *Senak, supra.* In this case, the record attests to the Society's independence and devotion to the interests of its clients. Indeed, the District Court specifically found that there was no evidence that the Society's attorneys were failing to do their best under the circumstances. There is, therefore, no legal issue in this case for this Court to consider.

II

Review of this case is not timely since the real issues of trial delay remain to be tried against the state agents who can provide the necessary resources to vindicate petitioners' rights.

The District Court's order in this action enjoined the Society from accepting further assignment of felony cases in Brooklyn Supreme Court so long as its attorneys' average caseload exceeded 40. In imposing a caseload limitation on the Society, the Court resorted to a novel remedy, not binding on other assigned counsel, with which the Court held the Society's attorneys compare favorably. It is not surprising therefore that the consequence of the decision below was to assign the representation of indigents to private attorneys who are not subject to any caseload limitation, who work without the supervision available to the Society's attorneys, and who are not adequately compensated for their time under state law. Every witness asked to compare the Society with private attorneys appointed under Article 18-B of the New York County Law expressed a preference for the Society.*

While asking this Court to review a wholly hypothetical question, petitioners are silent on the consequences of the actual injunction which the Second Circuit vacated. They now argue that as an abstract matter a failure of this Court to reverse the order of the Second Circuit would "deprive petitioners of the possibility of meaningful relief to vindicate their Sixth Amendment rights" (P. 18). As

* See, *e.g.*, pp. 125, 232, 297, 381 of the transcript of the *Wallace* hearings; pp. 311, 312, 669, 721 of the transcript of the *McLaughlin* hearings.

an even more abstract matter, petitioners contend that the order below leaves all indigent defendants "without an effective remedy" (P. 19), and they even state the only effective remedy would be one which gives the federal courts power to enjoin both "the public and the private participants in criminal justice administration" (P. 19).*

The actual facts of this case show how groundless these contentions are. The decision of the District Court did not, in actuality, further the right to counsel in Kings County, and the decision of the Circuit Court did not in any way impair that right. The interest to be vindicated herein was the right of indigents to effective representation. That right was not protected by an order which only enjoined defense counsel from representing clients and relegated indigents to a panel of private attorneys which was straining to discharge its limited responsibilities even before the District Court's order. It must be emphasized in this regard that the District Court did not find that a single Legal Aid attorney was not doing his best under the circumstances, and that since the injunction was dissolved the Society's caseload in Kings County has dropped well below the limit set by the District Court.

Petitioners' request—which the Society supports on behalf of its clients—for injunctive relief against trial delay in Kings County is still pending and demonstrates the fallacy in petitioners' claims that they have no effective remedy in this case. The real issues remain to be tried,

* Petitioners contend that "The ruling below draws an artificial distinction between the public and private participants in criminal justice administration" (P. 19). Even if this were so, and it is not, it is the same distinction drawn by the Constitution and 42 U.S.C. §1983.

and all of the relief necessary to vindicate petitioners' rights to a speedy and fair trial with effective assistance of counsel can still be granted by relief against the remaining defendants. Thus, even if there were any substantial legal questions presented by the Petition—which there are not—the entire case is not before this Court, and this Court should not act on the basis of a partial record on a preliminary injunction motion.

Conclusion

The Circuit Court's order is a proper application of principles laid down by the decisions of this Court and is consistent with authority in every other Circuit which has considered the matter. In addition, the order does not preclude the formulation of effective relief to vindicate petitioners' Sixth Amendment rights. Thus, the Petition does not raise any substantial question meriting consideration by this Court. Moreover, the essential mootness of the issues presented herein makes this an inappropriate case in which to grant a writ of certiorari. The Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-681

DONALD WALLACE, MICHAEL MCLAUGHLIN, *et al.*,

Petitioners,

—v.—

MICHAEL KERN, THE LEGAL AID SOCIETY, THE PEOPLE OF THE CITY AND STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITIONERS' SUPPLEMENTAL MEMORANDUM

Petitioners submit this supplemental memorandum pursuant to Rule 24(5) in order to call this Court's attention to a case recently decided in the Court of Appeals for the Seventh Circuit which squarely conflicts with the decision rendered by the Court of Appeals for the Second Circuit in the case at bar.

John v. *Hurt*, 14 Cr.L.Rep. 2239 (7th Cir., No. 73-4547, November 16, 1973),* was a suit brought *pro se* by an inmate of a state prison for damages against a public defender claiming a denial of Sixth Amendment rights and asserting federal jurisdiction under 42 U.S.C. §1983.

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* Because the Circuit Court of Appeals Opinion is not yet reported and to assist the Court in arriving at a determination of this petition, a copy of the Opinion is annexed as Appendix A.

The district court concluded that there were no facts pleaded by which defendant could be said to have acted under color of state law. The Court of Appeals reinstated the appeal, and considering it on the merits disagreed, stating:

> "It is at least arguable that a public defender acts under color of state law in his relationship with and representation of an indigent accused person. Although we recognize that after appointment in a given case, the professional relationship of the public defender with his client is similar to that of a private attorney with his client, the public defender ordinarily enjoys continuing employment by a unit of government, is often furnished an office as well as compensation, and appears to his client, as well as others, as a person cloaked with the authority of the state." (3a)**

The Court of Appeals went on to affirm on another ground, "that public defenders, like state prosecutors, and state and city attorneys, enjoy a qualified immunity for acts performed in the discharge of their official duties." (4a). The court felt that this extension of common-law immunity was needed to protect professional discretion and to aid in the recruitment of able attorneys for public defender work. The immunity doctrine is irrelevant to the instant action, which seeks no damages but only declaratory and injunctive relief. Petitioners do not question the discretion of individual Legal Aid attorneys but the manner in which the Society performs its constitutional mandate. In fact, it is intended to make it easier for attorneys to exercise their discretion to the fullest extent,* which pre-

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* See Appendix, Petition for a Writ of Certiorari, 29a-30a, 37a [Memorandum Opinion, United States District Court, Eastern District New York, (May 10, 1973) (Judd, J.)]

** References are to Appendix A to Petitioners' Supplemental Memorandum.

sumably would make Legal Aid service more attractive to competent attorneys.

The jurisdictional reasoning of *John* v. *Hurt* is clearly at variance with the perfunctory statement of the Court of Appeals in the instant case, which found no state action in the court's assignments of counsel to indigent defendants. Had the *John* court followed the reasoning of the Second Circuit Court of Appeals, it would never have reached the issue of immunity.

In a nation where fully two-thirds of all criminal defendants are indigents the problem of federal jurisdiction over state programs of representation of the criminal indigent is a recurring one. The recent flurry of circuit and district court opinions on this issue demonstrates that it is ripe for decision by this Court. In *Gardner* v. *Luckey*, —— F.Supp. ——, (M.D. Fla., No. 71-561, Civ. T/K, January 24, 1973), the District Court held that a public defender does not act under color of state law; an appeal is now pending before the Fifth Circuit Court of Appeals, (No. 73-1777, argued November 12, 1973). A similar action has recently withstood a motion to dismiss in the Northern District of Indiana, *Noe* v. *County of Lake*, (Civ. No. 73-H-157, November 1, 1973).* [This decision has not been appealed.]

Petitioners have shown the importance of this question in their petition. *John*, and the cases cited above underscore its significance. Action by this Court is necessary to resolve and clarify the law in this area, and to assure petitioners their right to a federal forum for their sub-

* A related question of federal jurisdiction over a publicly appointed attorney was at issue in *United States* v. *Senak*, 477 F.2d 304 (7th Cir. 1973), cert. denied, 94 S.Ct. 157 (1973).

stantial claims under the Sixth Amendment and the decisions of this Court.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

November 16, 1973.

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. WILBUR F. PELL, JR., *Circuit Judge*

No. 73-1547

EDWARD JOHN,

Plaintiff-Appellant,

—vs.—

ALBERT HURT,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

James L. Foreman, *Judge.*

Civil 73-103-E

ORDER

Plaintiff appealed from a judgment dismissing his complaint. Although the appeal was once dismissed, we confirm our order of October 12, 1973, reinstating the appeal,

and consider it on its merits, but without oral argument. Rule 2, F.R.A.P. Plaintiff's application for appointment of counsel is denied.

Plaintiff is an inmate of a state prison and is not represented. He sent his "complaint," "affidavit in forma pauperis," and other sheets of paper, variously entitled, to the district court. His pleading is to be held "to less stringent standards than formal pleadings drafted by lawyers" and the test is whether "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972), reh. denied, 405 U.S. 948.

The district court permitted filing in forma pauperis, but dismissed on the court's own motion without service of process on defendant. The district court concluded that there were no facts pleaded by which defendant could be said to have acted under color of state law.

Reading plaintiff's papers together, plaintiff alleged that defendant incompetently represented him as a "court appointed attorney" in a burglary trial before a state court; that plaintiff was found guilty and sentenced to imprisonment; that "defendant is clothed with the authority of state law"; that he deprived plaintiff of sixth amendment rights by giving plaintiff incompetent counsel; and that specifically defendant failed to move to suppress damaging evidence which was introduced at trial, failed to call all witnesses in plaintiff's behalf, and made statements in argument to the jury which involved plaintiff in the charge.

It is now clear, as a result of plaintiff's later submissions, and a letter from defendant to this court concerning the appeal, that defendant was the Public Defender of

Macon County, Illinois. In fairness to the district court it must be noted that plaintiff's original papers never expressly referred to defendant as public defender, although the caption of the complaint indicated his address as "Macon County Courthouse Decatur Illinois."

It is at least arguable that a public defender acts under color of state law in his relationship with and representation of an indigent accused person. Although we recognize that after appointment in a given case, the professional relationship of the public defender with his client is similar to that of a private attorney with his client, the public defender ordinarily enjoys continuing employment by a unit of government, is often furnished an office as well as compensation, and appears to his client, as well as others, as a person cloaked with the authority of the state. See, in the context of a criminal charge against a public defender acting under color of law, *United States* v. *Senak*, 477 F.2d 304 (7th Cir., 1973).

Assuming that defendant, as public defender, was acting under color of state law, plaintiff would still have to establish that defendant subjected him to the deprivation of a sixth amendment right. Looking at the complaint with required liberality, we can not say with assurance that plaintiff can adduce no facts to prove that defendant's alleged failures turned the state trial into a "sham or mockery" or at least "blotted out the essence of a substantial defense." *United States ex rel. Little* v. *Twomey*, 477 F.2d 767, 773 (7th Cir., 1973); *Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir., 1970).

Assuming, however, that defendant could be deemed to be acting under color of state law, and allowing for the possibility that plaintiff's proof might demonstrate such

incompetency as to amount to deprivation of sixth amendment rights, we think that, as a matter of law, defendant is immune from liability for damages, and plaintiff's complaint must fail.

The legislative history of 42 U.S.C. §1983 does not indicate that Congress intended to "abolish wholesale all common law immunities." *Pierson* v. *Ray*, 386 U.S. 547, 555 (1966). In part because of the same factors which lead us to think that state subsidized and appointed public defenders can act under color of state law, we conclude that public defenders, like state prosecutors, and state and city attorneys, enjoy a qualified immunity for acts performed in the discharge of their official duties. *Brown* v. *Joseph*, 463 F.2d 1046, 1048 (3rd Cir., 1972), *cert. denied*, —— U.S. ——. See *Arensman* v. *Brown*, 430 F.2d 190, 193 (7th Cir., 1970). We note that the extension of immunity to public defenders will encourage their free exercise of discretion in the performance of professional obligations, as well as aid in the recruitment of able men and women for public defender positions. See *Brown* v. *Joseph*, supra at 1048-49.

As contrasted with the indictment in *United States* v. *Senak*, supra, there are no factual allegations in the complaint at bar, even when construed broadly, which indicate that the acts complained of fall beyond the scope of defendant's immunity. In deciding whether to object to evidence, whether to call a particular witness, and how to address the jury, the public defender was performing acts within the scope of his employment. Although it may be established under the pleadings that defendant made gross errors of judgment, we note that there is no allegation that his conduct was intentionally harmful to plaintiff,

or otherwise deliberately inconsistent with his obligation to plaintiff so as to be a voluntary exercusion outside the scope of his duties. See *Hilliard* v. *Williams*, 465 F.2d 1212, 1218 (6th Cir., 1972), *cert. denied*, 409 U.S. 1029.

Accordingly, the clerk of this court is directed to enter judgment affirming the judgment appealed from.